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LaVonda N. Reed-Huff

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POLITICAL ADVERTISEMENTS IN THE ERA OF FLEETING INDECENT IMAGES AND UTTERANCES

LAVONDA N. REED-HUFF[†]

INTRODUCTION

Television and radio advertisements for years have been effective and popular campaign tools used by political candidates to gain votes. In an era of increasingly negative political campaign advertisements, some political figures and candidates have been the target of negative broadcast advertisements, suggesting that they have engaged in some form of sexually immoral or somehow unacceptable conduct.¹ Election seasons in recent years have ushered in a new breed of increasingly vulgar and sexually charged political broadcast advertisements.² So extreme are some advertisements in this new genre of political speech, they are dangerously close to violating current federal law prohibiting the broadcast via television and radio of indecent materials.

The once hypothetical sexually suggestive political advertisement is now a reality, and the truly indecent political advertisement might be on the near horizon. In the 1980s, Larry Flynt, creator of *Hustler* magazine, launched a campaign for

[†] Associate Professor of Law, Syracuse University College of Law. Thank you to Dean Hannah Arterian, Associate Professor Keith Bybee, Institute for the Study of the Judiciary, Politics, and the Media, Professors Lisa Dolak, Paula Johnson, William Wiecek, Leslie Bender, Rakesh Anand, the staff of the Barclay Law Library at Syracuse University College of Law, David Solomon, Esq., Associate Professor Akilah Folami, Hofstra University School of Law, and my research assistants Shaina Schallop, Cedric McGee, and Patricia McNeal.

¹ See YouTube, *Too Hot for Corker*, <http://www.youtube.com/watch?v=cWkrwENN5CQ> (last visited Apr. 20, 2010).

² See *id.*; YouTube, *Bad Call*, http://www.youtube.com/watch?v=DDZ_bPYWjd8 (last visited Apr. 20, 2010).

President.³ Flynt promised that his campaign advertisements would contain hardcore pornography.⁴ The Federal Communications Commission (the "FCC" or the "Commission") was prepared at the time to issue a ruling permitting broadcasters to reject the advertisements.⁵ Flynt never requested airtime for the advertisements, and the FCC's ruling never was issued.⁶

This new breed of political advertisements—Flynt's proposed advertisements not included—while not indecent under the FCC's current definition, is closer to crossing the lines of indecency than were offensive racist advertisements and gruesome anti-abortion advertisements of years past. In 2006, a sexually suggestive television advertisement appeared in Tennessee endorsing Republican Bob Corker in his race against Democrat Harold Ford, Jr. for a U.S. Senate seat.⁷ The Corker advertisement used sexually suggestive visual images to suggest that Ford frequented wild sex parties and had sexual liaisons with white women.⁸ Ford is black. In the advertisement, the bare shoulders and face of an otherwise seemingly unclothed young blonde woman appeared on the screen as the young blonde winked and purred into the camera that she had previously met Ford at a Playboy party.⁹ The advertisement closed with another shot of the still questionably clothed young blonde teasing Ford to call her.¹⁰ Ford lost the election.¹¹

³ Interview of FCC Enforcement Bureau Staff.

⁴ See *id.*

⁵ See *id.*

⁶ See Michael Isikoff, *The FCC*, WASH. POST, Jan. 3, 1984, at A15. In June 2007, Flynt placed an advertisement in the Washington Post offering \$1 million for stories involving the sex lives of government officials. Chris Richards, *Names & Faces*, WASH. POST, June 4, 2007, at C03.

⁷ The advertisement, titled "Too Hot for Corker"—sponsored by the Republican National Committee—opens with an African-American woman posing the question "Harold Ford looks good. Isn't that enough?" Then, the camera captures short sound bites from a series of people who appear to be citizens on a city street making comments about how Ford wants to protect the privacy of terrorists, will increase taxes, favors gun control, is not worried about the threat of North Korea, and has taken money from producers of pornographic movies—"Don't we all?" the citizen chuckles. *Too Hot for Corker*, *supra* note 1.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Vikas Bajaj et al., *South*, N.Y. TIMES, Nov. 9, 2006, at P11.

Another television advertisement broadcast in New York in the same year endorsed Republican Raymond Meier in his U.S. congressional campaign against Democrat Michael Arcuri.¹² The advertisement opened with superimposed images of a woman who appeared to be an exotic dancer straddling a chair and seductively dancing while purring “Hi, sexy”¹³ Meanwhile, the target of the advertisement, Arcuri, stared in the dancer’s direction while lasciviously and seductively licking his lips.¹⁴ The advertisement accused Arcuri of using Oneida County, New York taxpayer dollars to satisfy his sexual desires while on official business by calling an adult fantasy telephone hotline and then charging the call to his hotel room.¹⁵ Despite this advertisement, which ran in the days leading up to the election, Arcuri defeated his opponent to win the congressional seat.¹⁶

In early 2009, Stormy Daniels, a pornographic movie star, announced preliminary plans to run for the U.S. Senate from Louisiana against incumbent David Vitter, who was involved in a notorious call-girl scandal that rocked Washington, D.C. in 2007.¹⁷ A former nude model recently won election to the U.S. Senate from Massachusetts.¹⁸ Photos of the now Senator’s nude, yet pixilated, body appeared in many news reports leading up to the election. The possibility of these individuals or their challengers incorporating indecent material in their campaign advertisements is not so far-fetched.

Scholars, the FCC, and the courts have pondered for years how regulators would deal with the issue of indecency in political

¹² The advertisement, titled “Bad Call,” was paid for by the National Republican Congressional Committee. Annenberg Political Fact Check, *Republican Mudslinging on an Industrial Scale*, Oct. 27, 2006, <http://www.factcheck.org/article460.html>. It also features fleeting images of a clothed male lower body. *See Bad Call*, *supra* note 2.

¹³ *Bad Call*, *supra* note 2.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Raymond Hernandez, *G.O.P. Loses 4 House Seats in New York Region*, N.Y. TIMES, Nov. 8, 2006, at P2.

¹⁷ *See, e.g.,* Jonathan Tilove, *Adult Film Actress Contemplates Run To Unseat Vitter; She Asks Flynt To Be Campaign Manager*, TIMES-PICAYUNE (New Orleans), Feb. 13, 2009, at 4.

¹⁸ Frank Bruni, *Where Scott Brown Is Coming From*, N.Y. TIMES, Feb. 28, 2010, at MM24.

broadcasting. To date, they have focused primarily on the body of cases dealing with political advertisements depicting abortions, aborted fetuses, and racial hate speech.¹⁹ Existing cases have turned on the statutory and regulatory definitions of "indecent," "profanity," and "obscenity" and have suggested that broadcasters might have certain immunities and programming rights with respect to their decision to air political advertisements containing material they deem indecent, offensive, inappropriate, and harmful to children.²⁰

These newer, more sexually suggestive political advertisements present the dilemma at which lawmakers, courts, and scholars have hinted for years: how to reconcile three seemingly conflicting federal statutes which, on the one hand, seek to give political candidates greater access to the television and radio media and consequently to the eyes and ears of the

¹⁹ *E.g.*, Complaint by Atlanta NAACP Concerning Section 315 Political Broad. by J.B. Stoner, 36 F.C.C.2d 635 (1972) (use of the term "nigger") [hereinafter Stoner I]; Complaint by Bond Atlanta NAACP Concerning Political Broad., 69 F.C.C.2d 943 (1978) (use of the term "nigger") [hereinafter Stoner II]; Letter from Stewart, FCC to Pepper & Gastfreund, 7 F.C.C.R. 5599 (Aug. 21, 1992) (regarding broadcast of political campaign advertisement containing abortion-related material) [hereinafter Mass Media Bureau Letter to Kaye Scholer]; *see also* Samantha Mortlock, *What the [Expletive Deleted] Is a Broadcaster To Do? The Conflict Between Political Access Rules and the Broadcast Indecency Prohibition*, 14 GEO. MASON L. REV. 193, 193–95 (2006) (characterizing correctly the "dilemma" facing broadcast licensees); Complaints Regarding Various Television Broadcs. Between Feb. 2, 2002 & Mar. 8, 2005, 21 F.C.C.R. 2664 (2006) [hereinafter Omnibus Order]. A complaint was filed against a broadcast licensee for the broadcast outside the safe harbor of a political advertisement that mentioned rape, sodomy, and molestation. *Id.* at 2707. The advertisement did not feature any nude images or depictions of any of the described acts. *Id.* at 2708. The narrator of the advertisement states:

He used candy to lure the children into the house. Once inside, the three children were sexually molested. A four-year old girl raped. Her brothers—sodomized. A Belleville man was arrested and convicted for the crime after trying to develop pictures of the abuse. Despite prosecutor's objections, Judge Lloyd Karmeier gave him probation, saying "The court should grant leniency . . ." Another case where Karmeier let a violent criminal out into the community. Lloyd Karmeier—the wrong choice for Supreme Court. Paid for by the Democratic Party of Illinois.

Id. at 2708 n.236. The Commission stated that "[b]ecause we find that the advertisement is not indecent, we need not decide whether the Commission may propose forfeitures against licensees that broadcast indecent political advertisements outside of the safe harbor." *Id.* at 2708 n.234.

²⁰ *See, e.g.*, Stoner I, *supra* note 19, at 636–38; Stoner II, *supra* note 19, at 944; Mass Media Bureau Letter to Kaye Scholer, *supra* note 19, at 5599–600; *Becker v. FCC*, 95 F.3d 75, 79 (D.C. Cir. 1996); *see also* LaVonda N. Reed-Huff, *Offensive Political Speech 1970s to 2008: A Broadcaster's Moral Choice*, 8 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 241 (2008).

electorate, yet, on the other hand, seek to remove indecent material from the broadcast airwaves during hours of the day when children are likely to be in the audience.²¹ These statutes obligate broadcast licensees to provide nondiscriminatory and uncensored access to candidates for political office, yet fail to state an exception to broadcast indecency rules or to grant immunity to broadcasters forced to air political advertisements that contain at best sexually suggestive, and in the worst case, indecent, profane, or obscene material.²² While no broadcast licensee has been sanctioned by the government for the broadcast of an indecent political advertisement, the FCC has never had to answer that specific question. Moreover, the law is not clear that broadcasters are immune from such sanction were they to broadcast such an advertisement. With the recent decision by the U.S. Supreme Court in *FCC v. Fox Television Stations, Inc.*, and the FCC's policy of punishing even isolated and fleeting indecent material, the dilemma of broadcasters is even more profound.²³

Industry insiders and regulators point to the remote possibility of a political candidate seeking airtime to broadcast a political advertisement containing indecent material.²⁴ In an era where the media appears to take great fascination in the sex lives of elected officials and greater satisfaction in actually catching and embarrassing them for these exploits, we are certain to see more of this type of material emerge in political campaign advertisements.²⁵ Additionally, advertisements of this

²¹ 18 U.S.C. § 1464 (2006) (prohibiting broadcast indecency); 47 U.S.C. § 312(a)(7) (2006) (affording reasonable access to broadcast facilities for candidates for federal office); 47 U.S.C. § 315(a) (2006) (providing equal opportunities for use of broadcast facilities by candidates for the same office and prohibiting censorship).

²² See sources cited *supra* note 21.

²³ See *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009).

²⁴ See, e.g., Milagro Rivera-Sanchez & Paul H. Gates, Jr., *Abortion on the Air: Broadcasters and Indecent Political Advertising*, 46 FED. COMM. L.J. 267 (1994) (discussing indecent material in political advertising). One easily can imagine an advertisement featuring protesters uttering expletives or wearing clothing containing indecent material, whereas an undeniably indecent political advertisement seems unimaginable to most.

²⁵ Each of the anti-Ford and the anti-Arcuri advertisements were broadcast in a news cycle when the public also was bombarded by unrelated broadcast news stories of a congressman engaging in inappropriate sexual e-mail exchanges, and perhaps worse, with underage boys, and of an evangelical Christian minister using drugs and having sex with male prostitutes. See Michael Wolff, *It's the Adultery, Stupid*,

type are likely to become more prevalent in the wake of the Supreme Court's decision in *Citizens United v. Federal Election Commission*, which removes longstanding prohibitions against corporations and unions using money from their own treasuries to engage in electioneering communications.²⁶ Presumably, in future election cycles, broadcasters will receive far more requests by third-party noncandidates for airtime. Such third parties might take greater liberties with racy commercial content than would a candidate him or herself. Furthermore, due to the financial challenges facing broadcasters in recent years, local broadcasters are likely to welcome the new revenue stream flowing from corporations previously prohibited from purchasing advocacy oriented political advertisements.²⁷

This Article does not assert that either the aforementioned anti-Ford or anti-Arcuri political advertisements squarely falls

VANITY FAIR, June 2008, available at <http://www.vanityfair.com/politics/features/2008/06/wolff200806/> ("Politics is now about sex. . . . Sex (*sex*, not gender) in politics is as significant a subtext as race. It has the power to alter elections, undermine parties, and, possibly, change history. . . . We want to know. . . . Sex completes the picture—it explains so much. . . . It's a point of identification and differentiation."); Bill Cotterell & Jim Ash, *Foley Resigns from Congress*, TALLAHASSEE DEMOCRAT, Sept. 30, 2006, at A1 (discussing the resignation of Rep. Mark Foley (R-Fla.) amid allegations of substance abuse and inappropriate sexual conduct with underage congressional pages); Alan Cooperman, *Minister Admits To Buying Drugs and Massage*, WASH. POST, Nov. 4, 2006, at A02 (reporting on the activities of evangelical minister Ted Haggard). Since that time, the sordid details of the private lives of countless other politicians have flooded the broadcast and cable airwaves. See, e.g., *Senator Pleads Guilty in Sex-Sting Case*, VIRGINIAN-PILOT, Aug. 28, 2007, at A14 (reporting on the guilty plea of Senator Larry Craig (R-ID) stemming from his arrest for allegedly inappropriate behavior in an airport men's restroom); see also Mark Mueller, *Call Girl Scandal Engulfs Spitzer: N.Y. Governor Issues Apology*, THE TIMES (Trenton, N.J.), Mar. 11, 2008, at A01 (reporting on the admission of New York governor Eliot Spitzer of association with high priced escort service); David Zucchini & Elizabeth Mehren, *McGreevy's Double Life Changed in a Single Day*, L.A. TIMES, Aug. 15, 2004, at 26 (reporting on the revelation by the married New Jersey governor James E. McGreevy that he was gay and had an affair with a male staffer); Prentiss Findlay, *Sanford Tryst Makes Headlines Worldwide*, POST & COURIER (Charleston, S.C.), June 26, 2009, at A6 (reporting on Governor Mark Sanford of South Carolina's confession of an affair); *Edwards' Saga a Sad Unraveling*, CHAPEL HILL HERALD, Feb. 12, 2010, at ch2 (reporting on the "sex, lies and videotape scandal" surrounding former candidate for U.S. Vice President John Edwards); *Edwards Saga a Sad Reality Tale*, CHAPEL HILL HERALD, May 21, 2009, at ch2 (reporting on the investigation and controversy concerning John Edwards' relationship with a campaign videographer).

²⁶ *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010).

²⁷ Kevin Downey, *In Political Spending, All Markets Not Equal*, TVNEWSCHECK, Mar. 3, 2010, <http://www.tvnewscheck.com/articles/2010/03/03/daily.1/>.

within the subject matter scope of the FCC's current definition of indecency, but that they do signal a gradual yet significant shift toward the willingness of political candidates and their supporters to pay for campaign advertisements with a sexual overtone. This Article poses a question that has been asked by other scholars: What is a broadcaster to do in the event it is presented with political material that might fall within the subject matter scope of the FCC's definition of indecency? This Article offers some resolutions to this conflict taking into consideration recent court cases dealing with the issue of broadcast indecency.

This Article also addresses the recent struggle of the FCC and the courts to define indecency, to defend the continued relevance of current indecency rules in light of a converging and ever-changing technological environment, as well as an effort to clarify the boundaries of sanctionable material. The FCC has on more than one occasion sidestepped ruling on the issue of indecent political advertisements. In those cases, the material was determined not to have passed the threshold of satisfying the definition of indecency rendering the indecent political advertisement issue unripe for review.²⁸ None of these prior cases clearly answers the question of a broadcaster's liability in the event a broadcaster airs or chooses not to air a political advertisement that actually is determined to be indecent, profane, or obscene as those terms have come to be defined.

Scholars have proposed resolutions to this dilemma, including, *inter alia*, granting immunity from indecency sanctions and repealing one or more of the rules forming the dilemma.²⁹ The recent racy political advertisements go to the heart of the question of how broadcasters, without clear statutory language, may handle requests by political candidates, their supporters, or their opponents to air campaign advertisements that come close to satisfying the Commission's definition of indecency, and perhaps even the definitions of obscenity or profanity as well.

Part I of this Article describes the statutory conflict. This Part explains each of the rules and includes a detailed discussion of recent broadcast indecency actions including the indecency

²⁸ See, e.g., Omnibus Order, *supra* note 19, at 2707–08; Stoner II, *supra* note 19, at 944.

²⁹ See Mortlock, *supra* note 19, at 223–26.

cases recently decided by the U.S. Court of Appeals and the U.S. Supreme Court.³⁰ Part II addresses cases specifically involving political broadcast advertisements in which the courts granted immunity or excepted broadcasters of political advertisements from punishment under the indecency prohibition. Part III specifically evaluates the recent political advertisements containing sexually suggestive material, including the anti-Ford and anti-Arcuri advertisements. This Part addresses how courts have handled earlier claims of offensive political speech offering insight into how they might handle future claims.

Part IV of this Article revisits some of the earlier proposals for resolution of the dilemma facing broadcast licensees and offers new solutions to this dilemma.³¹ This Article reiterates the call for immunity for broadcasters that air political advertisements containing indecent material. In addition to evaluating this proposal, this Article reiterates some other previously suggested resolutions and recommends others. This Article recommends the following, in order of preference: (1) amend 18 U.S.C. § 1464 to expressly except political advertisements; (2) grant immunity to broadcasters; (3) repeal the indecency rules altogether or make them applicable to all services; (4) change the definition of indecent material; (5) amend 47 U.S.C. §§ 312 and 315 to prohibit indecent material in political broadcast advertisements; (6) permit channeling of indecent advertisements; (7) require or permit channeling of all political advertisements to the safe harbor; (8) wait for the perfect case and decide then; or (9) repeal 47 U.S.C. §§ 312 and 315 and the Zapple Doctrine.

In the absence of congressional action, courts could carve out a judicially created exception to the indecency statute as it has done in other contexts. This Article suggests that, despite the U.S. Supreme Court's holding in *Fox Television Stations*, which upheld the FCC's policy regarding fleeting indecent materials, the FCC must refine its indecency definition and regulatory scheme not only to address constitutional First Amendment issues, but also to offer a more workable rule for broadcasters to follow in making programming decisions.³²

³⁰ See, e.g., *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009).

³¹ See sources cited *infra* note 317.

³² See 5 U.S.C. § 706(2)(A) (2006).

I. THE STATUTORY CONFLICT

All FCC broadcast licensees must serve the “public convenience, interest, [and] necessity.”³³ That obligation has applied to the daily operations and overall mission of broadcasters since the earliest days of regulation of the industry. Congress and the FCC have enacted statutes, rules, and regulations that balance the interests of the various entities that comprise the “public” the FCC and its licensees are charged to serve. Among these statutes are those prohibiting indecency and those making the broadcast airwaves available to political candidates, while at the same time prohibiting censorship.³⁴

There are three main statutes promulgated to address these issues. The first statute in the trio is 47 U.S.C. § 312, which requires licensees of broadcast stations to afford reasonable access to its facilities for all candidates for federal elective office.³⁵ The second statute is 47 U.S.C. § 315, which requires broadcasters to afford equal opportunities to use broadcast facilities to all legally qualified candidates for the same political office and prohibits broadcasters from censoring political speech.³⁶ Finally, there is 18 U.S.C. § 1464, which prohibits the broadcast of indecent, obscene, or profane material over the broadcast airwaves.³⁷

³³ 47 U.S.C. § 307(a), (c)(1) (2006); *see also* Radio Act of 1927, Pub. L. No. 632, 44 Stat. 1162 (1927); Communications Act of 1934 (codified as amended at 47 U.S.C. § 151 (2006)); Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

³⁴ *See* 47 U.S.C. §§ 312, 315, 326 (2006); 18 U.S.C. § 1464 (2006).

³⁵ 47 U.S.C. § 312(a)(7).

³⁶ *Id.* § 315. A legally qualified candidate of public office is defined as any person who has publicly announced that he or she is a candidate for public office, meets the qualifications for serving in that office, is eligible to be elected to that office, and makes a substantial showing that he or she is a bona fide candidate for the office or for nomination to the office. 47 C.F.R. § 73.1940 (2010). Section 326 prohibits the FCC from engaging in censorship of broadcast material. *See* 47 U.S.C. § 326; *see also* Metromedia, Inc. Regarding Socialist Labor Party of Ca., 40 F.C.C. 423 (1965); *Use of Broadcast Facilities by Candidates for Public Office*, 24 F.C.C.2d 832, 860 (1970).

³⁷ *See* 18 U.S.C. 1464. While § 312 and § 315 do apply to cable and satellite systems, they have only limited applicability in these contexts. The obligations in those sections extend to cable and direct broadcast satellite service (“DBS”) channels only to the extent that the relevant programming is carried on a cable television or DBS system channel “subject to the *exclusive control*” of the cable or DBS provider. 47 C.F.R. § 76.205 (2010) (emphasis added); *see also* 47 C.F.R. § 25.701(b)(2) (2010) (“DBS origination programming is defined as programming (exclusive of broadcast signals) carried on a DBS facility over one or more channels and subject to the exclusive control of the DBS provider.”). A cable system is defined as any facility

This conflict lies in the inability of a broadcaster to reject candidate-sponsored political advertisements that contain indecent, obscene, or profane material. By leaving this issue unresolved, the federal government has hogtied broadcasters when it comes to their discretion to pick and choose which political advertisements they will air and when during the broadcast day they will air them.

A. *47 U.S.C. § 312: Sanctions for Failure To Provide Reasonable Access and for Broadcast of Indecent Material*

In recognition of the extraordinarily influential role played by the broadcast media in shaping the public's views and opinions on political matters, Congress enacted 47 U.S.C. § 312(a) seeking to give political candidates for federal office greater access to this influential medium of public communication with potential voters.³⁸ Congress also sought to contain the cost of this access.³⁹ Section 312(a) of the Communications Act provides for administrative sanctions for, among other things, the broadcast of indecent material⁴⁰ and the failure to allow candidates for *federal* elective office reasonable access to broadcast stations.⁴¹

Paragraph (7) of § 312(a) affords legally qualified candidates for federal office an affirmative right of reasonable access to a licensee's station and allows for license revocation in the event of

designed to provide video programming to multiple subscribers through "closed transmission paths," and does not include, *inter alia*, "a facility that serves subscribers without using any public right-of-way." 47 U.S.C. § 522(7)(B) (2006); *see also* FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 310 (1993). These rules do not apply to the Internet.

³⁸ 47 U.S.C. § 312(a)(7).

³⁹ *See* CBS, Inc. v. FCC, 453 U.S. 367, 379 (1981) (citing Federal Election Campaign Act of 1971: Hearings on S.1, S.382, and S.956 before the Subcommittee on Communications of the Senate Committee on Commerce, 92nd Cong., 1st Sess., 2 (1971) (remarks of Sen. Pastore); S. Rep. No. 92-96, 20 (1971), U.S. Code Cong. & Admin. News 1972, 1773-74).

⁴⁰ 47 U.S.C. § 312(a)(6) (providing for administrative sanctions for violation of 18 U.S.C. § 1464—broadcast of indecent material).

⁴¹ § 312(a)(7). The FCC has further regulated these requirements in 47 C.F.R. § 73.1944 (2010). Paragraph (a)(6) provides that the Federal Communications Commission may revoke any station license or construction permit for violation of 18 U.S.C. § 1464, which also provides for imprisonment of not more than two years. *See* 18 U.S.C. § 1464. Section 312 also provides for license revocation in the event a licensee broadcasts a lottery or engages in mail fraud. The court of appeals deferred to the FCC on the determination of when a campaign actually had begun. *See* CBS, Inc. v. FCC, 629 F.2d 1, 18 (D.C. Cir. 1980).

a broadcaster's willful or repeated failure to allow reasonable access to, or to permit purchase of reasonable amounts of time for the use of a broadcasting station, other than a noncommercial educational broadcast station, by a legally qualified candidate for federal elective office on behalf of his candidacy.⁴²

The statute does not define reasonable access, nor do FCC regulations offer any one particular definition. The FCC, however, has developed an individualized, case-by-case set of interpretative factors to be considered to effectuate the reasonable access requirements of § 312(a)(7), including the following: (1) a candidate's stated purpose in seeking air time; (2) the amount of time previously sold to the candidate; (3) the disruptive impact on the broadcaster's regular program schedule; and (4) the likelihood of requests for time by rival candidates under federal broadcast equal opportunity requirements.⁴³ The Supreme Court upheld the FCC's standard and practice of case-by-case determinations of reasonableness in *CBS v. FCC*.⁴⁴ The Court also opined that this practice did not "improperly involve the FCC in the electoral process or significantly impair broadcasters' editorial discretion."⁴⁵

Broadcasters must justify denials of access and may not use any of these considerations as a pretext for denial of access.⁴⁶ Additionally, broadcasters must cite "a realistic danger of substantial program disruption" to justify denial of reasonable

⁴² 47 U.S.C. § 312 (a)(7).

⁴³ See *CBS, Inc.*, 453 U.S. at 375, 387; Codification of the Comm'n's Political Programming Policies, 7 F.C.C.R. 678, 681 (1991) [hereinafter 1991 Policy Statement] ("[T]here may be circumstances when a licensee might reasonably refuse broadcast time to political candidates during certain parts of the broadcast day."); Public Notice, Licensee Responsibility Under Amendments to the Commc'ns Act Made by the Fed. Election Campaign Act of 1971, 47 F.C.C.2d 516, 516-17 (1974) [hereinafter Licensee Responsibility]; Comm'n Policy in Enforcing Section 312(a)(7) of the Commc'ns Act, Report & Order, 68 F.C.C.2d 1079, 1089 n.14, 1091 (1978) ("there may be circumstances when a licensee might reasonably refuse broadcast time to political candidates during certain parts of the broadcast day."); *Becker v. FCC*, 95 F.3d 75, 80 (1996) [hereinafter FCC 1978 Report & Order]. These circumstances are not defined. The Commission has indicated that in weighing these factors, it will focus on two issues: "(1) has the broadcaster adverted to the proper standards in deciding whether to grant a request for access, and (2) is the broadcaster's explanation for his decision reasonable in terms of those standards?" *CBS, Inc.*, 629 F.2d at 18.

⁴⁴ *CBS, Inc.*, 453 U.S. at 386-91.

⁴⁵ *Id.* at 369.

⁴⁶ See *id.* at 387.

access.⁴⁷ Generally, broadcasters are accorded deference, provided they demonstrate that they have acted reasonably and in good faith.⁴⁸ Blanket, across-the-board types of policies denying access to the station will not be accorded such deference upon agency review of a denial and very likely will be found unreasonable.⁴⁹

The affirmative right conferred upon federal candidates by the section is limited. This statutory provision does not confer upon political candidates any affirmative right of access to a broadcast station during any *particular time* of the broadcast day, but candidates may not be excluded from certain parts of the broadcast day, including prime time.⁵⁰ Similarly, there is no right to time during any particular program,⁵¹ nor is there any promise of free air time.⁵² Candidates must be willing to pay for the air time.⁵³

B. 47 U.S.C. §§ 315 and 326: Equal Opportunities and Prohibition Against Censorship

1. Equal Opportunities for Competing Candidates

While § 312(a)(7) provides candidates for federal office affirmative, albeit, reasonable access to use broadcast stations, § 315 of the Communications Act merely provides candidates for any public office equal opportunities of access to a licensee's station as are afforded other candidates.⁵⁴ The intent of this section is to afford rival candidates a comparable audience reach. Specifically, § 315 provides, "[i]f any licensee shall permit any

⁴⁷ *Id.*

⁴⁸ See *Carter-Mondale Presidential Comm., Inc.*, 74 F.C.C.2d 657, 673-74 (1979); *Carter-Mondale Presidential Comm., Inc.*, 74 F.C.C.2d 631, 644 (1979); FCC 1978 Report & Order, *supra* note 43, at 1093-94.

⁴⁹ See *CBS, Inc.*, 453 U.S. at 376 (citing *CBS, Inc. v. FCC*, 629 F.2d 1, 22 (D.C. Cir. 1980)).

⁵⁰ See FCC 1978 Report & Order, *supra* note 45, at 1090; Licensee Responsibility, *supra* note 43, at 517.

⁵¹ 1991 Policy Statement, *supra* note 43, at 697-98.

⁵² See FCC 1978 Report & Order, *supra* note 48, at 1088; 1991 Policy Statement, *supra* note 43, at 687.

⁵³ See *Kennedy for President Comm. v. FCC*, 636 F.2d 432, 448 (1980); *Law of Political Broad. and Cablecasting*, 69 F.C.C.2d 2209, 2288 (1978). Candidates are entitled to the lowest unit rate broadcasters charge their most favored commercial advertisers for that specific time of the broadcast day. See 47 C.F.R. § 73.1942 (2010).

⁵⁴ 47 U.S.C. § 315(a) (2006).

person who is a legally qualified candidate for *any* public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station.”⁵⁵

Section 315 does not grant candidates an affirmative right of reasonable access to a broadcast station in the way § 312(a)(7) does to federal candidates, but merely provides that once a broadcaster has provided access to its station to one candidate for any political office, it must provide the same access to its station to other candidates for that same political office.⁵⁶

The corresponding Zapple Doctrine represents an FCC policy granting equal time to third-party noncandidates once a broadcaster has provided airtime to an opposing third party.⁵⁷

⁵⁵ *Id.* (emphasis added).

⁵⁶ This includes the same amount of airtime, the same time slots, and the same prices. *See, e.g.,* Stephens, 11 F.C.C. 61, 64 (1945) (noting that not only must candidates be offered the same amount of airtime, but the desirability of the time slots offered competing candidates also must be comparable); *see also* Use of Broad. Facilities by Candidates for Pub. Office, 24 F.C.C.2d 832, 878, 881 (1970); Television Co. of Am., 40 F.C.C. 319, 319 (1961); Grace, 40 F.C.C. 297, 297 (1958); Political Broadcasting Requirements, 40 F.C.C. 265, 265 (1955) (noting that the FCC does not mandate particular rates but requires equal treatment of candidates in rates charged). The rule confers a legal right to a candidate only when an opposing candidate, not someone speaking on behalf of the opposing candidate, has used the station to advance his or her candidacy. *See* Felix v. Westinghouse Radio Stations, Inc., 186 F.2d 1, 2–3 (3d Cir. 1950). While Section 315 does not specifically address the rights of groups supporting or opposing candidates to access the broadcast station, pursuant to FCC policy, third parties might have a right of equal opportunity in certain circumstances.

⁵⁷ Request by Nicholas Zapple, Commc’ns Counsel, Comm. on Commerce for Interpretive Ruling Concerning Section 315 Fairness Doctrine, 23 F.C.C.2d 707, 707–09 (1970). Section 312 and Section 315 were invoked in an interesting way during the 2004 presidential campaign. In Fall, 2004, the Sinclair Broadcast Group (“Sinclair”) ordered all of its sixty-plus broadcast stations to show the film “Stolen Honor: Wounds That Never Heal” (“Stolen Honor”), a film featuring Vietnam veterans criticizing Democratic candidate John Kerry’s anti-war activities upon returning to the U.S. following his wartime service. *See* Jim Rutenberg, *Broadcast Group To Pre-empt Programs for Anti-Kerry Film*, N.Y. TIMES, Oct. 11, 2004, at 19. Airing the film would have preempted regularly scheduled primetime television programming. *Id.* Democrats claimed that Sinclair violated the equal time provision by not giving Kerry an opportunity to respond. *See* *Kerry Wants Equal Time*, N.Y. TIMES, Oct. 16, 2004, at 12; Bill Carter, *Broadcaster’s Stock Picks Up After Change on Kerry Film*, N.Y. TIMES, Oct. 21, 2004, at 27; Bill Carter & Scott Shane, *Viewers Get Only a Peek of a Movie Chiding Kerry*, N.Y. TIMES, Oct. 23, 2004, at 12. The party also claimed that the film amounted to a prolonged free political advertisement for George W. Bush that violated the campaign finance rules by not also airing a pro-Kerry advertisement of equal length. *See* Jim Rutenberg, *Party To File Complaint Against Broadcaster*, N.Y. TIMES, Oct. 12, 2004, at 22; *Sinclair Free*

Though considered to be related to the now defunct Fairness Doctrine, the Zapple Doctrine, which seems to have survived, is viewed as a quasi-equal opportunity principle that entitles supporters of a candidate with substantial support—generally nominees of major political parties—time comparable to that offered supporters of another candidate.⁵⁸ The Zapple Doctrine does not entitle supporters to the same degree of time, but rather, a roughly comparable opportunity to buy comparable time. This doctrine was created to deal with potential political imbalances that could be brought about by the influence of third-party supporters of candidates to avoid triggering equal opportunities for competing candidates.

Section 315 also contains four exceptions.⁵⁹ The section provides that there has been no use of the station by a legally qualified candidate when the candidate appears in: (1) a bona fide newscast,⁶⁰ (2) a bona fide news interview,⁶¹ (3) a bona fide news documentary if the appearance of the candidate is incidental to the presentation of the subject or subjects covered

To Run Its Attack, But We Trust Voters To See Through Its Hypocrisy, ASHEVILLE CITIZEN-TIMES, Oct. 15, 2004, at 8A. It was characterized as an "illegal campaign contribution." *Sinclair Free To Run Its Attack, But We Trust Voters To See Through Its Hypocrisy*, *supra*; see also Rutenberg, *Party To File Complaint Against Broadcaster*, *supra*. Sinclair eventually decided not to air the entire "Stolen Honor" film choosing instead to show "A POW Story: Politics, Pressure and the Media" which included portions of "Stolen Honor" and segments of another film "Going Upriver: The Long War of John Kerry" that Sinclair claimed contained segments more flattering to John Kerry. See Bill Carter, *Broadcaster Plans To Show Parts of Film*, N.Y. TIMES, Oct. 20, 2004, at 21; Carter & Shane, *supra*. In an interesting twist of application of the reasonable access and equal time statutes, the equal time provision and reasonable access provisions would have given more access to George W. Bush because it was John Kerry whose image appeared on screen. See Rutenberg, *Broadcast Group To Pre-empt Programs for Anti-Kerry Film*.

⁵⁸ The Fairness Doctrine required broadcasters to cover controversial issues, provide balanced coverage, and give free response time to individuals or groups covered by a station's news report. It was upheld in *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969), and later repealed by Complaint of Syracuse Peace Council, 2 FCC Rcd at 5043 (1987).

⁵⁹ 47 U.S.C. § 315(a).

⁶⁰ *Id.* § 315(a)(1).

⁶¹ *Id.* § 315(a)(2); see also Capitol Radio Networks, 11 F.C.C.R. 4674, 4674 (1996); Block, 7 F.C.C.R. 6882, 6883 (1992) (noting that the FCC also will consider whether the licensee has independent control over the program, and whether the broadcaster has control over format, content, and selection of interview participants are based on the licensee's good faith judgment as to the participant's newsworthiness, rather than for the purpose of furthering the participant's political candidacy); Station KFDX-TV, 40 F.C.C. 374, 374 (1962) (stating that bona fide news interviews must be regularly scheduled for the purposes of § 315).

by the news documentary,⁶² or (4) on-the-spot coverage of bona fide news events, including, but not limited to, political conventions and activities incidental thereto.⁶³

Until 2010, corporations and labor organizations were prohibited from using funds from their general treasuries to engage in electioneering communications.⁶⁴ The Supreme Court,

⁶² 47 U.S.C. § 315(a)(3); *see, e.g.*, *Ferrall*, 46 F.C.C.2d 1113, 1114 (1974) (asserting that the candidate's appearance must be incidental to the presentation of the subject matter and not simply to advance the candidate's candidacy).

⁶³ 47 U.S.C. § 315(a)(4); *see also* *Kennedy for President Comm. v. FCC*, 636 F.2d 417, 426 (D.C. Cir. 1980) (noting that three factors will be considered to determine whether coverage of a candidate's press conference is exempt as on-the-spot coverage of a news event: (1) whether the conference is live; (2) whether the broadcaster makes a good faith determination that the conference is a bona fide news event; and (3) whether the broadcaster demonstrates any favoritism toward the candidate); *Nat'l Org. for Women v. FCC*, 555 F.2d 1002, 1010 (D.C. Cir. 1977) (noting that the Commission will not question a broadcast licensee's judgment as to what constitutes news "unless there is extrinsic evidence of deliberate distortion or news staging or unless the licensee consistently fails to report news events of public importance that could not in good faith be ignored") (citations omitted); *Hargove*, 66 F.C.C.2d 1055 (1976) (holding that an appearance by a candidate on a newscast, bona fide news interview, bona fide news documentary or on-the-spot coverage of a bona fide news event is not "deemed a use of a broadcasting station for the purposes of Section 315").

⁶⁴ 2 U.S.C. § 441b (2006), *invalidated by* *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010). An "electioneering communication" is defined as any broadcast, cable, or satellite communication which refers to a clearly identified candidate for Federal office . . . made within 60 days before a general, special, or runoff election for the office sought by the candidate; or 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate . . . [or] any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.

2 U.S.C. § 434 (Supp. I 2007), *invalidated by* *Citizens United*, 130 S. Ct. 876. The term "electioneering communication" does not include--

- (i) a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate;
- (ii) a communication which constitutes an expenditure or an independent expenditure under this Act;
- (iii) a communication which constitutes a candidate debate or forum conducted pursuant to regulations adopted by the Commission, or which

in *Citizens United*, held that 2 U.S.C. § 441b was unconstitutional as applied to corporations engaged in express advocacy of a political candidate.⁶⁵ Citing First Amendment concerns about promoting a free marketplace of ideas and affording citizens as much information as possible in making voting decisions,⁶⁶ the Court potentially opened the floodgates for corporate money to influence political campaigns.⁶⁷

With the exception of political action committees created by corporations, until 2010, as it relates to reasonable access under § 312 and equal opportunities under § 315 and the Zapple Doctrine, these rules were not applicable to corporations and unions. To date, whether the equal opportunity provisions will apply to corporations also remains unresolved. It is likely that they will be found to create equal opportunity rights in corporations using their own treasury funds, not just those of their political action committees.

It remains to be seen whether, in the wake of *Citizens United*, Congress will extend to corporations and third parties the right of reasonable access to broadcast stations. Right now, the right of access afforded by § 312 applies only to federal candidates. Because the rule does not apply to candidates other than federal candidates, a good case could be made for not extending this right of access to corporations or to other third parties either.

2. Censorship Prohibition and Channeling

In addition to equal opportunity protection, § 315 also prohibits broadcasters from censoring broadcast material.⁶⁸ It provides in relevant part that “such licensee shall have no power of censorship over the material broadcast under the provisions of

solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum; or
(iv) any other communication exempted under such regulations as the Commission may promulgate.

Id.

⁶⁵ *Citizens United*, 130 S. Ct. 876.

⁶⁶ *Id.* at 903–08.

⁶⁷ *Id.* at 968 (Stevens, J., dissenting).

⁶⁸ 47 U.S.C. § 315(a); 1991 Policy Statement, *supra* note 43, at 683; *see also* 47 U.S.C. § 326 (2006) (prohibiting the FCC from engaging in censorship of broadcast content).

this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate.”⁶⁹

Section 315 does not expressly state that the indecency prohibition of 18 U.S.C. § 1464⁷⁰ does not apply to political broadcast material. Additionally, § 1464 does not state that political advertisements are excepted from the indecency, obscenity, and profanity prohibition.⁷¹ In other words, although neither a licensee nor the government may censor political broadcast material under § 315 or § 326, respectively, neither section expressly excepts political broadcast material from what may be considered actionably indecent.

Section 326 prohibits the government from censoring or prohibiting speech up front, but does not prohibit the government from punishing, after the fact, speech that violates § 1464.⁷² This loophole, and that in § 312, are what potentially could find broadcasters in a quandary, unable to prohibit the speech themselves, unable to request that the Commission prohibit the speech, yet not insulated from liability should indecent political speech be broadcast over the public airwaves.

In the 1970s, broadcasters were faced with the dilemma of what to do when a political candidate requested broadcast time to air a political advertisement in which the candidate spewed white supremacist hate speech and boldly referred to blacks as “niggers.”⁷³ By the early 1990s, broadcasters were faced with the

⁶⁹ 47 U.S.C. § 315(a).

⁷⁰ 18 U.S.C. § 1464 (2006).

⁷¹ *Id.*

⁷² See *FCC v. Pacifica Found.*, 438 U.S. 726, 738 (1978) (“We conclude, therefore, that § 326 does not limit the Commission’s authority to impose sanctions on licensees who engage in obscene, indecent, or profane broadcasting.”). In 1927 and 1934, the anticensorship provision of § 326 and the indecency prohibition of § 1464 were enacted in the same section. A 1948 revision of the U.S. Federal Criminal Code to include statutory provisions located in other titles, the prohibition against the broadcast of obscene, indecent, and profane material was removed from the Communications Act and reenacted as part of the criminal code. Courts have concluded that this change in the criminal code was not intended to change the applicability of the anticensorship provision of § 326.

⁷³ See generally *Stoner II*, *supra* note 19; *Stoner I*, *supra* note 19. During his U.S. senatorial campaign in Georgia, J. B. Stoner made a political announcement stating:

I am J. B. Stoner. I am the only candidate for U.S. Senator who is for the white people. I am the only candidate who is against integration. All of the other candidates are race mixers to one degree or another. I say we must repeal Gambrell’s civil rights law. Gambrell’s law takes jobs from us whites

dilemma of how to handle requests for airtime by candidates for political office to broadcast advertisements depicting aborted fetuses.⁷⁴ At the time, it was argued by broadcasters and some in the public that the advertisements either were indecent, obscene, profane, or all of the above, and therefore should be barred from broadcast television altogether.⁷⁵ In the alternative, it was suggested that the advertisements be relegated to hours of the viewing day when children were less likely to be in the viewing audience and when the chance of potential harm to them would be reduced.⁷⁶

C. *18 U.S.C. § 1464: Prohibition Against Broadcast Indecency, Obscenity, and Profanity*

Section 1464 of title 18 of the United States Code provides that “[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined . . . or imprisoned not more than two years, or both.”⁷⁷ The purpose of this law is to protect children from harmful material broadcast over the public airwaves.⁷⁸ In addition to the two-year prison term, violation of this section also subjects a broadcast licensee to license revocation and a fine of up to \$325,000 per violation.⁷⁹ The

and gives those jobs to the niggers. The main reason why niggers want integration is because the niggers want our white women. I am for law and order with the knowledge that you cannot have law and order and niggers too. Vote white. This time vote your convictions by voting white racist J. B. Stoner into the run-off election for U.S. Senator. Thank you.

Stoner I, *supra* note 19, at 636.

⁷⁴ See generally Mass Media Bureau Letter to Kaye Scholer, *supra* note 19 (regarding broadcast of political campaign advertisement containing abortion-related material).

⁷⁵ See, e.g., Stoner II, *supra* note 19, at 944–45; Stoner I, *supra* note 19, at 635 (where NAACP argued that use of the word “nigger” posed an imminent and immediate threat to the public); see also Mass Media Bureau Letter to Kaye Scholer, *supra* note 19.

⁷⁶ Mass Media Bureau Letter to Kaye Scholer, *supra* note 19.

⁷⁷ 18 U.S.C. § 1464 (2006). This provision was moved from the Communications Act to the federal criminal code in 1948.

⁷⁸ See *FCC v. Pacifica Found.*, 438 U.S. 726, 749–50 (1978).

⁷⁹ See 47 U.S.C. § 503(b)(2)(C) (2006) (“If the violator is . . . a broadcast station licensee or permittee; . . . [and is] determined . . . to have broadcast obscene, indecent, or profane language, the amount of any forfeiture penalty . . . shall not exceed \$325,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of \$3,000,000 for any single act or failure to act.”); 47 C.F.R. § 1.80(a)(4), (b)(1) (2010). In 2006, Congress raised the maximum fine to \$325,000 per violation following

Commission has clearly stated that it does not regulate indecency on cable or satellite subscription services.⁸⁰

The FCC's indecency rules have undergone significant judicial review over the last decade.⁸¹ Particularly, federal courts have reviewed an FCC policy change that now punishes the broadcast of fleeting indecent language and images.⁸² These courts have, *inter alia*, considered whether the FCC acted arbitrarily or capriciously in changing a longstanding rule that did not punish broadcast of fleeting indecent material.⁸³ Additionally, the U.S. Court of Appeals for the Second and Third Circuits have addressed the question of whether the new policy of sanctioning fleeting expletives violates the First Amendment of the U.S. Constitution.⁸⁴

1. Indecent Material: Fleeting Expletives and Images and the First Amendment

Indecent programming is "language that describes in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory

several years of highly publicized indecent broadcast incidents. 47 U.S.C. § 503(b)(2)(C)(ii). Previously, the base monetary sanction for violation of the FCC's indecency, profanity, and/or obscenity restrictions was \$7,000 per violation with a maximum fine of \$32,500 per violation. The fine may be adjusted based on such factors as the nature, circumstances, extent, and gravity of the violation, the degree of culpability of the violator, the violator's history of prior offenses, the violator's ability to pay, and such other factors as justice may require. *See* Industry Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. 1464 and Enforcement Policies Regarding Broad. Indecency, 66 Fed. Reg. 21984, 21986 (May 2, 2001); Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, § 2, 120 Stat. 491 (2006) (codified as 47 U.S.C. § 503(b)(2)(C)).

⁸⁰ *See* Various Complaints Against the Cable/Satellite Television Program "Nip/Tuck," 20 F.C.C.R. 4255, 4255-56 (2005). While all services are subject to the reasonable access, equal opportunity, and censorship rules, albeit to differing degrees, cable and satellite service providers are not subject to the same rules governing indecency and profanity as are traditional over-the-air television and radio broadcast licensees. Obscenity, however, is prohibited on all services at all times. 47 C.F.R. § 73.3999(a) (2010).

⁸¹ *See, e.g.,* FCC v. CBS Corp., 129 S. Ct. 2176 (2009), *rev'g*, 535 F.3d 167 (3d Cir. 2008); FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800 (2009), *rev'g*, 489 F.3d 444 (2d Cir. 2007).

⁸² *See* cases cited *supra* note 81.

⁸³ *See* cases cited *supra* note 81.

⁸⁴ *See* Fox Television Stations, Inc. v. FCC, No. 06-1760-ag (2d Cir. Jan. 13, 2010); CBS Corp. v. FCC, No. 06-3575 (3d Cir. Feb. 23, 2010).

activities and organs.”⁸⁵ It is material intended to pander or titillate, or that is vulgar or lewd.⁸⁶ Although indecent speech receives First Amendment protection, courts have upheld the FCC’s authority to prohibit television and radio broadcasts of indecent material during times of the day when there is a reasonable risk that children will be in the viewing or listening audience.⁸⁷ Broadcasters may broadcast indecent and profane material during the safe harbor viewing period of 10:00 p.m. to 6:00 a.m.—those hours of the day when children are less likely to be in the viewing and listening audience.⁸⁸ This is called channeling.

In determining liability for the broadcast of indecent material, the FCC applies a two-prong test.⁸⁹ First, the Commission will determine whether the speech indeed is indecent under the Commission’s definition of the term.⁹⁰ Second, it will consider the context in which the speech arises, taking into consideration whether it is “patently offensive as measured by contemporary community standards for the

⁸⁵ See *Citizen’s Complaint Against Pacifica Found. Station WBAI (FM)*, 56 F.C.C.2d 94, 98 (1975); see also *FCC v. Pacifica Found.*, 438 U.S. 726, 731–32 (1978). Because the FCC is expressly prohibited from censoring broadcast material, and because it does not regulate by monitoring broadcast material, the FCC relies almost exclusively on the viewing and listening public to register complaints regarding offensive and inappropriate broadcast programming. It is this larger community standard by which the FCC regulates and reacts to programming alleged by listeners and viewers to be indecent, obscene, or profane.

⁸⁶ See *Pacifica*, 438 U.S. at 747–48.

⁸⁷ See, e.g., *id.* at 749–50; *Action for Children’s Television v. FCC*, 58 F.3d 654, 669–70 (D.C. Cir. 1995) (en banc) [hereinafter *ACT III*]; see also *United States v. Playboy Entm’t Group*, 529 U.S. 803, 811 (2000) (“[W]hen we consider the further circumstance that the material comes unwanted into homes where children might see or hear it against parental wishes or consent, there are legitimate reasons for regulating it.”); *Reno v. ACLU*, 521 U.S. 844, 875 (1997) (“It is true that we have repeatedly recognized the governmental interest in protecting children from harmful materials.”).

⁸⁸ See *Action for Children’s Television*, 58 F.3d at 669–70.

⁸⁹ See *Complaints Regarding Various Television Broad. Between Feb. 2, 2002 & Mar. 8, 2005*, 21 F.C.C.R. 13299, 13303–04 (2006) [hereinafter *Omnibus Remand Order*].

⁹⁰ See *Pacifica*, 438 U.S. at 750 (noting that “[c]ontext is all-important” in indecency determinations); *Industry Guidance on the Comm’n’s Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding Broad. Indecency*, 16 F.C.C.R. 7999, 8002 (2001) [hereinafter *Indecency Policy Statement*]; *Omnibus Remand Order*, *supra* note 89.

broadcast medium.”⁹¹ To determine whether the material broadcast is indecent, the FCC looks at three primary factors: (1) whether the description or depiction is explicit or graphic; (2) whether the material dwells on or repeats at length descriptions or depictions of sexual or excretory organs; and (3) whether the material appears to pander, or is used to titillate or shock.⁹² None of these three factors alone is determinative, but must be balanced to determine whether the material, taking into consideration its context, is indecent.⁹³

Until recently, the prohibition against indecent material has relied on the U.S. Supreme Court’s holding in *FCC v. Pacifica Foundation*.⁹⁴ In that case, the Court was asked to resolve the question of whether the FCC could fine a broadcaster for airing during the afternoon daylight hours the twelve-minute “Filthy Words” monologue by George Carlin in which he identified seven “words you couldn’t say on the public . . . airwaves” and then proceeded to repeat them over and over in various forms.⁹⁵ The Court upheld the FCC’s authority to regulate broadcast indecency.⁹⁶

The Court in *Pacifica* acknowledged that the media occupied “a uniquely pervasive presence in the lives of all Americans.”⁹⁷ Furthermore, the Court opined that because “broadcasting is uniquely accessible to children, even those too young to read,” broadcasting has the potential to affect them particularly in a negative way.⁹⁸ It can “enlarge[] a child’s vocabulary in an instant.”⁹⁹ Therefore, “the government’s interest in the well-being of its youth and in supporting parents’ claim to authority in their own household justified the regulation of otherwise

⁹¹ Indecency Policy Statement, *supra* note 90; *see Pacifica*, 438 U.S. at 750; Omnibus Remand Order, *supra* note 89.

⁹² Omnibus Order, *supra* note 19, at 2668; Indecency Policy Statement, *supra* note 90, at 8003; *see also* Application of Pacifica Found., 95 F.C.C.2d 750, 760–61 (1983) (defining indecency and finding that isolated use of expletives during the license term “fail[ed] to raise a substantial and material question of fact as to whether renewal of WPFW’s license would serve the public interest, convenience and necessity”).

⁹³ Indecency Policy Statement, *supra* note 90, at 8003.

⁹⁴ 438 U.S. 726 (1978).

⁹⁵ *Id.* at 729.

⁹⁶ *Id.* at 737.

⁹⁷ *Id.* at 748.

⁹⁸ *Id.* at 749.

⁹⁹ *Id.*

protected expression.”¹⁰⁰ The holding in *Pacifica*, however, is not limited to use of the seven words used by George Carlin in “Filthy Words.”¹⁰¹ Depending on the context in which the speech is uttered, innuendo and double entendre may be considered indecent when coupled with other explicit references.¹⁰² *Pacifica* suggests that channeling indecent broadcasts to the wee hours of the morning avoids exposing children to material that might be inappropriate for or harmful to them.¹⁰³

Pacifica has been interpreted to be limited to repeated uses of indecent material.¹⁰⁴ Until recently, the Court and the FCC reasoned that they would focus on deliberate and repetitive use of expletives and other such language used in a patently offensive manner.¹⁰⁵ After thirty years of adherence to this policy, the FCC changed its policy significantly and has put broadcast licensees on notice that it no longer will permit the broadcast of even fleeting and isolated use of profanity.¹⁰⁶ In *Fox Television Stations*, the Supreme Court upheld the FCC’s policy change, which no longer limits its indecency prohibition to repeated utterances or depictions of indecent material, but also sanctions fleeting indecent broadcast material.¹⁰⁷

A number of complicated and highly politically charged issues remained unresolved following *Fox Television Stations*. The Supreme Court declined to address the First Amendment implications of the new rule that would sanction fleeting

¹⁰⁰ *Id.* (internal quotations omitted).

¹⁰¹ See *Pacifica Found., Inc.*, 2 F.C.C.R. 2698, 2699 (1987) [hereinafter *Pacifica M&O*].

¹⁰² See, e.g., *Infinity Broad. Corp. of Pa.*, 2 F.C.C.R. 2705, 2705–06 (1987).

¹⁰³ See *Pacifica*, 438 U.S. at 749–51; *Citizen’s Complaint Against Pacifica Found. Station WBAI (FM)*, 56 F.C.C.2d 94, 96 (1975), *rev’d*, 556 F.2d 9 (D.C. Cir. 1977), *rev’d*, 438 U.S. 726 (1978).

¹⁰⁴ *Pacifica*, 438 U.S. at 750.

¹⁰⁵ *Id.* (“We have not decided that an occasional expletive . . . would justify any sanction or . . . would justify a criminal prosecution.”); *Pacifica M&O*, *supra* note 101, at 2699.

¹⁰⁶ See *Complaints Against Various Broad. Licensees Regarding Their Airing of the “Golden Globe Awards” Program*, 19 F.C.C.R. 4975, 4980 (2004) [hereinafter *Golden Globe Order*]; *Omnibus Order*, *supra* note 19, at 2664; *Omnibus Remand Order*, *supra* note 89, at 13,299. The Commission adopted this policy without initiating a new rulemaking proceeding.

¹⁰⁷ See *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1812–13 (2009), *reversing Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 455 (2d Cir. 2007) (addressing the isolated and fleeting use of various forms of the words “shit” and “fuck” and other profane material).

expletives and remanded the issue to the Court of Appeals.¹⁰⁸ How the federal courts will resolve the First Amendment challenges to the FCC's current indecency regulatory scheme remains to be seen.¹⁰⁹

The FCC is caught in a tough position. On the one hand, are the political pressures from certain constituents and from concerned persons pressuring the government to preserve some safe radio spectrum for programming suitable for a young audience.¹¹⁰ On the other hand, there are those asserting the FCC's regulation in this area offends the First Amendment and who cite to the Supreme Court's holding in *Pacifica* and the FCC's longstanding policy against sanctioning fleeting expletives.¹¹¹ Also complicating the issue is the disparate regulation of broadcast and subscription services and the resulting economic implications of that regulatory disparity. Some argue that the omnipresence of these services and other technological advances disputes the continued strict regulation of broadcast services.¹¹² They would argue that this disparate treatment is no longer warranted and indeed is unfair regulation from an economic perspective.¹¹³ Currently, the overwhelming majority of television viewers have abandoned reliance on traditional over-the-air broadcast, choosing instead to subscribe to either cable or satellite service. That being the case, most consumers today draw little distinction between broadcast and subscription services as they all overwhelmingly are consumed via cable or satellite services. As such, the relevance of the different

¹⁰⁸ See *Fox Television Stations*, 129 S. Ct. 1800; *FCC v. CBS Corp.*, 129 S. Ct. 2176 (2009).

¹⁰⁹ Cases have been argued in both the Second and Third Circuits. See *Fox Television Stations, Inc. v. FCC*, No. 06-1760-ag (2d Cir. Jan. 13, 2010); *CBS Corp. v. FCC*, No. 06-3575 (3d Cir. Feb. 23, 2010).

¹¹⁰ See Brief of Amici Curiae Focus on the Family & Family Research Council in Support of Respondents at 11–12, *Fox Television Stations*, No. 06-1760-ag (Oct. 27, 2009).

¹¹¹ See *Pacifica*, 438 U.S. at 750; *Pacifica M&O*, *supra* note 101, at 2699. See generally Brief of Petitioners, *Fox Television Stations*, No. 06-1760-ag (Sept. 16, 2009); Brief of Amicus Curiae American Civil Liberties Union et al. in Support of Petitioners, *Fox Television Stations*, No. 06-1760-ag (Sept. 16, 2009) [hereinafter Brief for ACLU].

¹¹² See Brief of Petitioner Fox Television Stations, Inc., at 52–56, *Fox Television Stations*, No. 06-1760-ag (Nov. 12, 2009); Amici Curiae Brief of the Thomas Jefferson Center for the Protection of Free Expression & the Media Institute at 11, *Fox Television Stations*, No. 06-1760-ag (Sept. 16, 2009).

¹¹³ See *id.*

treatment of broadcast services and subscription services, which are not subject to the same prohibitions against airing indecent material, for the purpose of the public interest in protecting children from indecent material has little continued value or relevance since indecent material is not prohibited on cable and satellite channels or on the Internet. Perhaps statutory law and agency regulations should reflect this market change. Perhaps the indecency prohibition should apply to all services—broadcast, cable, and satellite service—equally.¹¹⁴

On remand to the Second Circuit, amici called for a repeal of the indecency rules¹¹⁵ or, in the alternative, a return to earlier FCC policy that would limit sanctions to broadcasts that dwell or repeat at length prohibited indecent words and images.¹¹⁶ On remand, opponents of the new FCC indecency policy raised issues about the appropriate standard for content-based broadcast regulation and about the relevance of *Pacifica* as well as other Supreme Court and Court of Appeals indecency cases.¹¹⁷ Petitioners and amici objected to the FCC's regulatory policy on First Amendment grounds.¹¹⁸ They contended that the rules which take into account the context of the speech are vague, resulting in a chilling effect due to the self-censoring broadcasters engage in to avoid violating the FCC's inconsistent application of the indecency rules.¹¹⁹ They argued that the rule is not sufficiently tailored to serve the goal of protecting children.¹²⁰ They also pointed to technological advances such as the V-chip and argue that these advances have made available less restrictive means of regulating indecent speech.¹²¹ The FCC

¹¹⁴ Even the regulatory treatment of the newer technology of mobile television is uncertain.

¹¹⁵ See Brief for ACLU, *supra* note 111, at 27–29.

¹¹⁶ See Reply Brief for Petitioners CBS Broadcasting Inc. et al. at 2–4, *Fox Television Stations, Inc. v. FCC*, No. 06-1760-ag (Nov. 12, 2009).

¹¹⁷ See Reply Brief of Petitioner Fox Television Stations, Inc., *supra* note 112, at 7–10, *Fox Television Stations*, No. 06-1760-ag (Nov. 12, 2009). The parties also have raised issues about scienter. See Brief of Petitioner Fox Television Stations, Inc. at 22–27, *Fox Television Stations*, No. 06-1760-ag (Sept. 16, 2009); Reply Brief of Petitioner Fox Television Stations, Inc., *supra* at 3–6; Brief for Respondents FCC & United States at 24–26, *Fox Television Stations*, No. 06-1760-ag (Oct. 28, 2009).

¹¹⁸ See Brief of Petitioner Fox Television Stations, Inc., *supra* note 117, at 50–57.

¹¹⁹ See Brief for ACLU, *supra* note 111, at 19–23.

¹²⁰ See *id.* at 3–10.

¹²¹ See Brief of Petitioner Fox Television Stations, Inc., *supra* note 117, at 52–56; Amici Curiae Brief of the Thomas Jefferson Center for the Protection of Free Expression & the Media Institute, *supra* note 112, at 11.

countered that the availability of technological advances does not change the constitutional analysis.¹²² This availability-of-technology argument cuts both ways. Broadcasters have at their disposal various technological methods—such as bleeping, blurring, warnings, disclaimers, and pixulation—to protect the viewing audience from fleeting indecent material.

Additionally, petitioners argued that broadcasting is no longer as uniquely pervasive or uniquely accessible by children as might have been the case when those cases were decided.¹²³ Furthermore, they argued that broadcasters are unfairly disadvantaged in the marketplace that includes unregulated platforms like cable and satellite service and the Internet. They argued, therefore, that the basis for regulation found in *Red Lion Broadcasting Co. v. FCC*¹²⁴ and in *Pacifica* is no longer relevant.¹²⁵

What follows is a discussion of recent cases that have brought us to this point in indecency regulation. It explores the recent and pending cases relevant to adoption and application of the FCC's new policy of sanctioning fleeting expletives.

a. 2003 "Golden Globe Awards": FCC Adopts a New Policy

In 2003, musician Bono, upon learning that he had been awarded a Golden Globe, exclaimed on a live National Broadcasting Company, Inc. ("NBC") broadcast that his recognition was "really, really fucking brilliant. Really, really, great."¹²⁶ The FCC's Enforcement Bureau denied the numerous

¹²² See Brief for Respondents FCC and United States, *supra* note 117, at 38–43.

¹²³ See Brief of Petitioner Fox Television Stations, Inc., *supra* note 117, at 51–52; Brief for Petitioners CBS Broadcasting Inc. et al., *supra* note 116, at 21–27.

¹²⁴ 395 U.S. 367 (1969).

¹²⁵ See Amici Curiae Brief of the Thomas Jefferson Center for the Protection of Free Expression & the Media Institute, *supra* note 112, at 10, (citing *Reno v. ACLU*, 521 U.S. 844 (1997)) (Internet regulation); see also *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000) (cable regulation); *Sable Commc'ns of Cal. v. FCC*, 492 U.S. 115 (1989) (telephone regulation).

¹²⁶ Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 18 F.C.C.R. 19,859 (2003) [hereinafter Enforcement Bureau Golden Globes Decision]. In 2009, the FCC received a new round of indecency complaints about NBC's live broadcast of the 2009 Golden Globes during which a movie director gave the finger to actor Mickey Rourke who was on stage accepting an award. See *Broadcast*, COMMC'NS DAILY (Warren Commc'n News, Washington D.C.), Jan. 21, 2009; *Broadcast*, COMMC'NS DAILY (Warren Commc'n News, Washington D.C.), Jan. 14, 2009. The Commission now must grapple with the question of whether the gesture could be considered indecent.

complaints received in response to the broadcast on the grounds that Bono's utterance of the word "fucking" was isolated and fleeting and thus not punishable.¹²⁷ The Enforcement Bureau concluded that, in this case, use of the word "fucking" did not refer to a sexual act, but was used more as a modifier similar to using a term like "extremely" or "really."¹²⁸ The Enforcement Bureau concluded, therefore, that the speech was not indecent as defined by the Commission and as supported by a long line of FCC policy regarding fleeting uses of such language.¹²⁹

Despite the action by the Enforcement Bureau and the agency's own long established policy reaffirming that fleeting expletives uttered on broadcast stations would not be actionable, the full Commission overturned the bureau's ruling, concluding that the utterance, while admittedly fleeting was now considered profane, indecent, and patently offensive under contemporary community standards.¹³⁰ The Commission explained that the word "fuck" and all variations of it, however they are used, have a sexual connotation.¹³¹ It stated further that "the 'F-Word' is one of the most vulgar, graphic, and explicit descriptions of sexual activity in the English language," insinuating that all uses of it describes sexual activity, even if not used literally so.¹³² The Commission declined to sanction NBC in this particular instance because utterances of fleeting expletives were not actionable at the time Bono uttered them on live television. Nevertheless, the Commission warned all broadcast licensees that the Commission would consider any future use of the "F-word" and all variations of it, even as an "intensifier" or modifier, to be indecent and profane and thus actionable.¹³³

¹²⁷ Enforcement Bureau Golden Globes Decision, *supra* note 126, at 19,860-61.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Golden Globe Order, *supra* note 106, at 4979-81 ("While prior Commission and staff action have indicated that isolated or fleeting broadcasts of the 'F-Word' such as that here are not indecent or would not be acted upon, consistent with our decision today we conclude that any such interpretation is no longer good law.").

¹³¹ *Id.* at 4979.

¹³² *Id.*

¹³³ *Id.* at 4978, 4982.

NBC and other broadcasters filed petitions for reconsideration and a petition to stay the FCC's order.¹³⁴ To date, the FCC has not acted on these petitions pending federal court decisions on this and other cases, but has applied the policy adopted in the *Golden Globes Order* to subsequent cases.¹³⁵

In 2006, the FCC consolidated into one order a response to four other complaints against various licensees for the following broadcasts: (1) Fox's "2002 Billboard Music Awards," in which entertainer Cher stated "I've also had critics for the last 40 years saying that I was on my way out every year. Right. So fuck 'em. I still have a job and they don't.";¹³⁶ (2) Fox's "2003 Billboard Music Awards" during which presenter, Nicole Richie, stated "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple.";¹³⁷ (3) several episodes of the ABC network's weekly hour-long police drama "NYPD Blue," which contained the words "bullshit," "dick," and "dickhead";¹³⁸ and (4) an episode of the CBS network's "The Early Show," where a guest during a live morning interview used the word "bullshitter."¹³⁹

The FCC found each of these broadcasts indecent and profane under the new policy it adopted in the *Golden Globes Order*.¹⁴⁰ Using the same analysis it used in the *Golden Globes Order*, the Commission stated again that any use of any variation of the word "fuck" is presumed indecent and profane.¹⁴¹ Similarly, any use of "shit" also was determined to be presumptively indecent and profane.¹⁴² Additionally, the

¹³⁴ See Brief in Opposition of NBC Universal, Inc. and NBC Telemundo License Co. at 7, *FCC v. Fox Televisions Stations, Inc.*, 129 S. Ct. 1800 (2009) (No. 07-582).

¹³⁵ See *id.* at 7–8; Omnibus Order, *supra* note 19, at 2667; Omnibus Remand Order, *supra* note 89, at 13,301, 13,304–05. See generally *Golden Globe Order*, *supra* note 106.

¹³⁶ Omnibus Order, *supra* note 19, at 2690 & n.164.

¹³⁷ *Id.* at 2691–93.

¹³⁸ *Id.* at 2696.

¹³⁹ *Id.* at 2698–99.

¹⁴⁰ *Id.* at 2690–91, 2693–94, 2696–99. See generally *Golden Globe Order*, *supra* note 106.

¹⁴¹ Omnibus Order, *supra* note 19, at 2686, 2691; see *Golden Globe Order*, *supra* note 106, at 4979–81.

¹⁴² Omnibus Order, *supra* note 19, at 2696–97, 2699–700. The Commission did not consider utterances of the word "dick" and its derivative, "dickhead," in the context they were presented to be patently offensive. *Id.* at 2696–97. The terms were not used to describe a sexual organ but rather to denigrate another person. *Id.* at 2696. Therefore, the use of "dick" and "dickhead" were not found to be indecent. *Id.* at 2696–97. The Commission, however, found use of the word "shit" to be patently offensive as measured by community standards, and thus indecent. *Id.* at 2697.

broadcasts were found explicit, shocking, and gratuitous, and thus, patently offensive.¹⁴³ Again, the Commission declined to issue a forfeiture because the utterances were made when the old policy that found isolated fleeting expletives neither indecent nor profane was in effect.¹⁴⁴ Because of this, the FCC concluded that the broadcasters did not have adequate notice of the new policy regarding the broadcast of fleeting or isolated expletives.¹⁴⁵

Fox, CBS, and ABC filed petitions for review of the order.¹⁴⁶ On voluntary sixty-day remand, the FCC issued a new order, the *Omnibus Remand Order*, addressing these four incidents.¹⁴⁷ Rejecting arguments opposing sanctioning isolated and fleeting utterances, the *Omnibus Remand Order* vacated in substantial part the *Omnibus Order*.¹⁴⁸ The FCC reaffirmed its holding that both the 2002 and 2003 Fox Billboard Music Awards shows contained indecent and profane material.¹⁴⁹ The "NYPD Blue" forfeiture was vacated on procedural grounds and the complaint against ABC was dismissed.¹⁵⁰

The Commission reversed its decision regarding "The Early Show" broadcast.¹⁵¹ It concluded that because the use of the word "bullshitter" on "The Early Show" occurred during a "bona fide news interview," it was not subject to forfeiture.¹⁵² Although the FCC has never recognized a formal exception in the indecency

¹⁴³ *Omnibus Order*, *supra* note 19, at 2691, 2694, 2697, 2699.

¹⁴⁴ *Id.* at 2692, 2695, 2698, 2700.

¹⁴⁵ *Id.* at 2700.

¹⁴⁶ Fox and CBS filed a petition in the Second Circuit. ABC Television Network ("ABC") and Hearst-Argyle Television, Inc. filed a joint petition for review in the D.C. Circuit. The Second Circuit granted Fox's motion to consolidate these cases. *Omnibus Remand Order*, *supra* note 89, at 13,301.

¹⁴⁷ See *Omnibus Remand Order*, *supra* note 89, at 13,299, 13,302 (addressing complaints that four television programs contained indecent and profane material).

¹⁴⁸ *Id.* at 13,302.

¹⁴⁹ *Id.* at 13,325 (concluding that Cher's use of the "F-Word" in Fox's broadcast was patently offensive).

¹⁵⁰ *Id.* at 13,328-29.

¹⁵¹ *Id.* at 13,328.

¹⁵² See *id.* at 13,326-27 ("[T]here is no outright news exemption from our indecency rules."). The FCC relied on its Indecency Policy Statement which suggests that context is important and that "[e]xplicit language in the context of a bona fide newscast might not be patently offensive." Indecency Policy Statement, *supra* note 90, at 8002. Although the FCC has never recognized a formal exception in the indecency rules for "bona fide news interviews," the Commission seemed to excuse the use of the term in that instance. The Commission, however, has never said, nor did it say in the case of "The Early Show," that it would never act on indecent material presented in a bona fide news context.

rules for “bona fide news interviews,” the Commission excused the use of the term “bullshitter” in that instance.¹⁵³ The Commission, however, has never said, nor did it say in the case of “The Early Show,” that it would never act on indecent material presented in a bona fide news context. Along the same vein, the FCC has never said that it would never act in the political advertisement context either.

The *Omnibus Remand Order* was appealed to the Second Circuit.¹⁵⁴ On appeal, the Second Circuit vacated and remanded the FCC’s decision to the Commission for further proceedings.¹⁵⁵ The Second Circuit found that the agency’s new policy on fleeting expletives “represents a significant departure from positions previously taken by the agency and relied on by the broadcast industry.”¹⁵⁶ The court also found that the FCC’s new policy was arbitrary and capricious, the agency having failed to provide a reasoned basis for the policy change.¹⁵⁷

The Second Circuit recognized that federal agencies may revise their rules and policies as they find appropriate, but that such agency rule and policy changes must be supported by a “reasoned explanation” of why the new rule or policy is better than the old rule or policy.¹⁵⁸ The court concluded that the Commission failed to offer such a reasoned explanation for its new policies on either fleeting expletives or profanity.¹⁵⁹ Moreover, the Second Circuit rejected the FCC’s argument that fleeting expletives must not be exempted from a finding of indecency because to do so would “unfairly force[] viewers (including children) to take ‘the first blow’” referred to by the

¹⁵³ See *Omnibus Remand Order*, *supra* note 89, at 13,326–27.

¹⁵⁴ *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444 (2d Cir. 2007), *rev’d*, 129 S. Ct. 1800 (2009).

¹⁵⁵ *Id.* at 467.

¹⁵⁶ *Id.* at 447. In 2001, the Commission attempted to provide broadcasters with guidance on its indecency enforcement policy. The Commission excepted fleeting expletives and sexual references from indecency enforcement action. The agency also stressed the importance of taking potentially indecent material in proper context. Indecency Policy Statement, *supra* note 90, at 8016–17.

¹⁵⁷ *Fox Television Stations*, 489 F.3d at 447.

¹⁵⁸ *Id.* at 456–57.

¹⁵⁹ *Id.* at 460–62.

Court in *Pacifica*.¹⁶⁰ The Court in *Pacifica*, it held, made it clear that it was not offering an opinion on fleeting utterances of profanity.¹⁶¹

The Second Circuit struggled to reconcile the Commission's nearly thirty years of acquiescence to the problem of the proverbial "first blow" with its newfound concern about fleeting expletives.¹⁶² Specifically, the Second Circuit found that the FCC did not provide a "reasonable explanation for why it has changed its perception that a fleeting expletive was not a harmful 'first blow' for the nearly thirty years between *Pacifica* and *Golden Globes*."¹⁶³ The court found that the FCC failed to produce any evidence that a fleeting expletive is harmful. Additionally, the exceptions the Commission seemed to carve out appeared to undercut its concerns about the "first blow." The Commission's treatment of the material presented in "The Early Show" as excusable because it appeared in a bona fide news interview, as well as its excuse of the expletives that were considered "integral" to a work, such as those that appeared in the movies "Saving Private Ryan" and "Schindler's List," indeed forced viewers to take the first blow.¹⁶⁴ The Second Circuit found that the FCC failed to support its "first blow" theory in light of these gaping holes.¹⁶⁵ Nor could the decision in "Saving Private Ryan" be reconciled with the decision in "The Blues: Godfathers and Sons," where the FCC issued a Notice of Apparent Liability

¹⁶⁰ FCC v. *Pacifica Found.*, 438 U.S. 726, 748 (1978); Omnibus Remand Order, *supra* note 89, at 13,309. The first blow analogy suggests that while a listener or viewer may elect to turn off the television or radio or switch the channel after hearing offensive language, listeners and viewers should not have to be subjected to this proverbial "first blow," but that FCC rules may prohibit the utterance or depiction of indecent, profane, or obscene material altogether. In doing so, viewers and listeners are spared suffering the needless first blow.

¹⁶¹ *Pacifica*, 438 U.S. at 750.

¹⁶² *Fox Television Stations*, 489 F.3d at 457–58. The Court in *Pacifica* rejected the argument that "one may avoid further offense by turning off the radio when he hears indecent language." 438 U.S. at 748–49.

¹⁶³ *Fox Television Stations*, 489 F.3d at 457–58; *see Pacifica*, 438 U.S. 726; *Golden Globe Order*, *supra* note 106, at 4975.

¹⁶⁴ *See Fox Television Stations*, 489 F.3d at 458–59; Complaints Against Various Television Licensees Regarding Their Broad. on Nov. 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan," 20 F.C.C.R. 4507, 4512–13 (2005) [hereinafter *Saving Private Ryan Complaint*]. "Saving Private Ryan" is a dramatic movie about combat soldiers in World War II. "Schindler's List" is a drama based on the real life experiences of a German businessman and Jews enslaved by Nazis during World War II.

¹⁶⁵ *Fox Television Stations*, 489 F.3d at 458–59.

under seemingly similar circumstances.¹⁶⁶ Because the FCC did not prohibit the broadcast of all expletives, the court could not find support for this new policy.¹⁶⁷ The court also disagreed with the FCC's conclusion that the "F-word" has an inescapable sexual connotation, pointing out that the word often is used in casual daily conversation without a sexual meaning.¹⁶⁸ This case was appealed to the United States Supreme Court, which granted the FCC's and U.S. government's petition for writ of certiorari.¹⁶⁹

The issue on appeal to the U.S. Supreme Court was "[w]hether the court of appeals erred in striking down the FCC's determination that the broadcast of vulgar expletives may violate federal restrictions on the broadcast of 'any obscene, indecent, or profane language,' even when the uttered expletives are not repeated."¹⁷⁰

Petitioners, the FCC and the U.S. government, argued that the Second Circuit's opinion conflicts with the Court's holding in *Pacifica*.¹⁷¹ Petitioners seemed to concede that pursuant to *Pacifica* and Commission decisions, when "a complaint focuses solely on the use of expletives, . . . repetitive use in a patently offensive manner is a requisite to a finding of indecency."¹⁷² But, they contended that when offensive language involves not just

¹⁶⁶ See Omnibus Order, *supra* note 19, at 2686 (issuing Notice of Apparent Liability for Forfeiture for Broadcast of "The Blues: Godfathers and Sons," a blues documentary); see also Brief for ACLU, *supra* note 111.

¹⁶⁷ See *Fox Television Stations*, 489 F.3d at 456–58. The Second Circuit did acknowledge the warning in *Pacifica* that a total ban on expletives would raise significant constitutional questions. *Id.* at 457–58.

¹⁶⁸ *Id.* at 459–60.

¹⁶⁹ *FCC v. Fox Television Stations, Inc.*, 128 S. Ct. 1647 (2008).

¹⁷⁰ See Petition for a Writ of Certiorari at 1, *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009) (No. 07-582) (citation omitted) (quoting 18 U.S.C. § 1464 (2006)); see also 18 U.S.C. § 1464 (2006); 47 C.F.R. § 73.3999 (2010). Respondents Fox Television Stations, Inc., CBS Broadcasting Inc., and ABC, Inc. have framed the issue as "[w]hether the court of appeals correctly held as a matter of administrative law that the FCC failed to provide a reasoned basis for reversing its longstanding indecency enforcement policy with respect to isolated and fleeting expletives." Brief in Opposition of Respondents Fox Television Stations, Inc. et al. at (i), *Fox Television Stations*, 129 S. Ct. 1800 (No. 07-582). Respondent NBC Universal, Inc. and NBC Telemundo License Company frame the issue as "[w]hether the court of appeals erred in holding that the Commission had failed to explain adequately the abrupt reversal of its longstanding determination that fleeting and isolated utterances of expletives generally fall outside the Commission's definition of broadcast indecency." Brief in Opposition of NBC Universal, Inc. and NBC Telemundo License Co., *supra* note 134, at (i).

¹⁷¹ Petition for a Writ of Certiorari, *supra* note 170, at 15.

¹⁷² *Pacifica M&O*, *supra* note 101, at 2699.

expletives, but describes sexual or excretory functions, "repetition of specific words or phrases is not necessarily an element critical to a determination of indecency."¹⁷³ The Commission, it argued, had established that determinations of patent offensiveness are fact specific.¹⁷⁴ In determining whether material is patently offensive, it will consider the "full context" of the broadcast.¹⁷⁵ The Commission claimed in its petition for writ of certiorari, therefore, that even fleeting references may be found indecent if other factors such as graphic language or explicit language "contributing to a finding of patent offensiveness" are present.¹⁷⁶

Petitioners argued further that the Second Circuit imposed "hurdles" in supporting its changed policy that "find no support in the Administrative Procedure Act."¹⁷⁷ They argued that the agency must continually review its policies, and that it may make policy changes where "prior polic[ies] failed to implement properly the statute."¹⁷⁸ The failure the agency alleged was the drawing of "an artificial distinction between expletives and descriptions or depictions of sexual or excretory activity" despite the fact that "an expletive's power to offend derives from its sexual or excretory meaning."¹⁷⁹

At the heart of respondents' argument was that the Administrative Procedure Act requires that the FCC justify, by a more reasoned explanation, the decision to change a thirty-year old policy not to consider fleeting expletives to fall within the definition of indecency.¹⁸⁰ Respondents, seeking to uphold the Second Circuit's decision, argued, first, that there is no conflict

¹⁷³ *Id.*

¹⁷⁴ See Petition for a Writ of Certiorari, *supra* note 170, at 4.

¹⁷⁵ Indecency Policy Statement, *supra* note 90, at 8002-03.

¹⁷⁶ Petition for a Writ of Certiorari, *supra* note 170, at 5 (internal quotation marks omitted) (quoting Indecency Policy Statement, *supra* note 90, at 8008-09).

¹⁷⁷ *Id.* at 21; see also 5 U.S.C. § 706(2)(A) (2006).

¹⁷⁸ Petition for a Writ of Certiorari, *supra* note 170, at 22 (quoting *Rust v. Sullivan*, 500 U.S. 173, 187 (1991)) (internal quotation marks omitted).

¹⁷⁹ Omnibus Remand Order, *supra* note 89, at 22 (internal quotation marks and citation omitted).

¹⁸⁰ See Brief in Opposition of Respondents Fox Television Stations Inc. et al., *supra* note 170, at 2; Brief in Opposition of NBC Universal, Inc. and NBC Telemundo License Co., *supra* note 134, at 1 (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)).

between the Second Circuit's decision and *Pacifica*.¹⁸¹ Second, respondents argued that the Second Circuit's decision was consistent with administrative law principles and other precedent including *ACT III*.¹⁸² Finally, they argued that the Second Circuit's remand to the FCC did not warrant the Court's review.¹⁸³

The U.S. Supreme Court, in *Fox Television Stations*, was presented with a twist of the possibility of the dilemma described in this Article.¹⁸⁴ In questioning respondents' counsel, Justice Breyer sought examples of some of the practical problems facing small broadcasters in applying available technology such as tape

¹⁸¹ See Brief in Opposition of Respondents Fox Television Stations, Inc. et al., *supra* note 170, at 10; Brief in Opposition of NBC Universal, Inc. and NBC Telemundo License Co., *supra* note 134, at 23.

¹⁸² Brief in Opposition of Respondents Fox Television Stations, Inc. et al., *supra* note 170, at 14; Brief in Opposition of NBC Universal, Inc. and NBC Telemundo License Co., *supra* note 170, at 15. In *ACT III*, the D.C. Circuit rejected arguments that the FCC's indecency definition was vague and overbroad. *Action for Children's Television v. FCC*, 58 F.3d 654, 659 (D.C. Cir. 1995). Additionally, the D.C. Circuit upheld the FCC's policy of channeling indecent material to the safe harbor, but disagreed with the disparate application of the safe harbor to stations that signed off at or before midnight and all other broadcast stations. The court, therefore, directed the FCC to enlarge the safe harbor hours to include the hours from 10:00 p.m. to 6:00 a.m. instead of midnight to 6:00 a.m. The D.C. Circuit in earlier cases had also upheld the FCC's indecency regulation. See, e.g., *Action for Children's Television v. FCC*, 932 F.2d 1504, 1508 (D.C. Cir. 1991) (holding that indecent material is afforded First Amendment protection as long as it is channeled); *Action for Children's Television v. FCC*, 852 F.2d 1332, 1334 (D.C. Cir. 1988) (upholding FCC's definition of indecency, but concluding that the Commission did not adequately justify its channeling approach, which curtails the hours when nonobscene programs containing indecent speech may be broadcast). The D.C. Circuit, in *ACT III*, held that scientific evidence of harm to children was not necessary to show a compelling governmental interest. *Action for Children's Television*, 58 F.3d at 662. *ACT III* dealt with pornographic material, not fleeting expletives.

¹⁸³ Respondents also argued that the Commission's definition of indecency is unconstitutionally vague, tending to chill large amounts of speech. Respondents cited the lenient standard applied in the *Saving Private Ryan* case in which the Commission was deferential to the artistic freedom of the filmmaker and the subject matter—war—and contrasting that with the lack of deference shown the filmmaker in a documentary about blues music. See Omnibus Order, *supra* note 19, at 2685–87 (issuing notice of apparent liability for forfeiture for broadcast of “The Blues: Godfathers and Sons,” a blues documentary); *Saving Private Ryan* Complaint, *supra* note 164, at 4512–14; see also Brief in Opposition of Respondents Fox Television Stations, Inc. et al., *supra* note 170, at 6; Brief in Opposition of NBC Universal, Inc. and NBC Telemundo License Co., *supra* note 134, at 29. In 1997, the Court struck down a similar indecency standard in the Communications Decency Act, finding the standard unconstitutionally vague. See *Reno v. ACLU*, 521 U.S. 844, 874 (1997).

¹⁸⁴ See Transcript of Oral Argument at 52–54, *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009) (No. 07–582).

delays.¹⁸⁵ Counsel for respondent offered an example in which a public station in Vermont refused to broadcast a debate or to allow a candidate to participate in a debate because the candidate was known to have used expletives in earlier public forums.¹⁸⁶ The station did not want to take the chance that the candidate would utter an expletive on air when the station did not have and could not afford the tape delay technology that could have prevented any expletives from going out over the airwaves.¹⁸⁷

The Court's decision in the fleeting expletives case, however, did not better define what constitutes indecent material or the extent to which fleeting images or other isolated sexual content in political campaign advertisements actually triggers the statutory conflict in question here.¹⁸⁸ Furthermore, as discussed herein, the Court remanded to the Second Circuit the issue of whether the policy of sanctioning fleeting expletives offends the First Amendment.¹⁸⁹

b. Janet Jackson and the Bare Breast: CBS Corp. v. FCC

Pending at the Third Circuit is the case involving the alleged wardrobe malfunction at the 2004 Super Bowl halftime show featuring musical performers Janet Jackson and Justin Timberlake. The year 2004 marked the now infamous CBS live television broadcast of Super Bowl XXXVIII, when during the halftime show featuring musical performers Janet Jackson and Justin Timberlake, an apparent "wardrobe malfunction" resulted in Jackson's bare breast being exposed on screen for a fraction of a second.¹⁹⁰ That fraction of a second of exposure of Jackson's

¹⁸⁵ *See id.*

¹⁸⁶ *See id.*

¹⁸⁷ *See id.*

¹⁸⁸ *Fox Television Stations*, 129 S. Ct. at 1811–13.

¹⁸⁹ *Id.*

¹⁹⁰ *See, e.g.*, Complaints Against Various Television Licensees Concerning Their Feb. 1, 2004 Broad. of the Super Bowl XXXVIII Halftime Show, Notice of Apparent Liability for Forfeiture, 19 F.C.C.R. 19,230, 19,230, 19,235 (2004) [hereinafter Super Bowl NAL], *aff'd*, Complaints Against Various Television Licensees Concerning Their Feb. 1, 2004 Broad. of the Super Bowl XXXVIII Halftime Show, Forfeiture Order, 21 F.C.C.R. 2760 (2006) [hereinafter Super Bowl Forfeiture Order], *aff'd*, Complaints Against Various Television Licensees Concerning Their Feb. 1, 2004 Broad. of the Super Bowl XXXVIII Halftime Show, Order on Reconsideration, 21 F.C.C.R. 6653 (2006), [hereinafter Super Bowl Order on Reconsideration], *vacated*, *CBS Corp. v. FCC*, 535 F.3d 167 (3d Cir. 2008), *vacated*, *FCC v. CBS Corp.*, 129 S. Ct. 2176 (2009). Jackson's bare breast was on the screen for a mere nine-sixteenths

bare breast resulted in an “unprecedented number of complaints” to the FCC.¹⁹¹

Upon review, the FCC found the performance indecent and issued a forfeiture in the amount of \$550,000 against all of CBS’s twenty locally owned affiliates.¹⁹² First, the Commission determined that the Super Bowl XXXVIII broadcast fell within the subject matter scope of the FCC’s definition of indecency.¹⁹³ The broadcast, which was aired outside the safe harbor, was found to depict “sexual or excretory organs or activities”—the bare breast.¹⁹⁴ On the determination of patent offensiveness, the FCC considered the Janet Jackson breast reveal in the context of the entire halftime show and concluded that the entire halftime show was “patently offensive as measured by contemporary community standards for the broadcast medium.”¹⁹⁵ Besides the duo performance by Jackson and Timberlake, the halftime show included performances by other artists who sang songs with sexual innuendo and who danced suggestively.¹⁹⁶ The depiction

of a second. *See* Brief of Petitioners CBS Corp. et al. at 3, *CBS Corp.*, 535 F.3d 167 (No. 06-3575). In 2009, yet another Super Bowl-related incident raised eyebrows and could result in FCC enforcement action. Somewhere between ten to thirty seconds of a male pornographic video program interrupted the live feed of the Super Bowl to Comcast cable customers in Tucson, Arizona. *See* Brian J. Pedersen, *Super Bowl Porn Clip ‘a Malicious Act,’* ARIZ. DAILY STAR, Feb. 3, 2009, at A1. The broadcaster confirmed the incident, but contended that the pornography was not included in the feed when it dispensed the signal to cable operators. *See id.*

¹⁹¹ Super Bowl NAL, *supra* note 190, at 19,231. The actual number of complaints received by the Commission is in dispute, as a significant percentage of the complaints received were either duplicates or form complaints generated by a small number of special interest groups.

¹⁹² *Id.* at 19,230, 19,240, 19,242. At the time, the maximum indecency fine was \$27,500. *See id.* at 19,230. The twenty CBS-owned affiliates were fined the maximum \$27,500 for the broadcast. *Id.* at 19,230, 19,240, 19,242. The FCC reaffirmed the \$550,000 forfeiture on remand. *See* Super Bowl Forfeiture Order, *supra* note 190, at 2778. Later in 2006, the FCC denied a petition for reconsideration of the case. *See* Super Bowl Order on Reconsideration, *supra* note 190, at 6653.

¹⁹³ *See* Super Bowl Forfeiture Order, *supra* note 190, at 2771–72.

¹⁹⁴ *See id.* at 2764–65 (quoting Industry Guidance on the Comm’n’s Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding Broad. Indecency, 16 F.C.C.R. 7999, 8002 (2001) (policy statement)).

¹⁹⁵ *See id.* at 2765.

¹⁹⁶ *See id.* at 2766. During the performance, Timberlake and Jackson danced and teased one another. *See* Brief of Respondents at 10–11, *CBS Corp. v. FCC*, 535 F.3d 167 (3d Cir. 2008) (No. 06-3575). Timberlake grabbed Jackson, rubbed against her body, and slapped her buttocks. *Id.* All the while, he pleaded with Jackson to let him “rock your body” and “just let me rock you ‘til the break of day.” *Id.* at 11. Then, as he peeled off her brassiere, he sang “gonna have you naked by the end of this song.” *Id.*

of the nude breast was found to be graphic and explicit.¹⁹⁷ While the agency determined that the material did not dwell or repeat at length on the exposure of the nude breast and was merely a fleeting image, the FCC concluded that "even relatively fleeting references may be found indecent where other factors contribute to a finding of patent offensiveness."¹⁹⁸

As for the third factor in the test for patent offensiveness determinations, the FCC concluded that the skillfully choreographed routine of Jackson and Timberlake in the context of the entire halftime show did have the effect of titillating, pandering to, and shocking the viewing audience who had no prior warning of what was to come during this performance.¹⁹⁹ So, even though the depiction of the nude female breast was found to be fleeting in nature, the Commission found that the other two factors used to determine whether broadcast material is patently offensive outweighed the lack of dwelling and repetition of the depiction of the nude breast.²⁰⁰ It was graphic, explicit, tending to titillate, pander, and shock.²⁰¹ Thus, the material, which was aired outside the safe harbor, fell within the FCC's definition of indecency and was patently offensive as measured by contemporary community standards for the broadcast medium.²⁰²

Additionally, the FCC found that the performance aired by CBS and its affiliates was "willful."²⁰³ The Commission made such a determination not because CBS consciously broadcast the nude breast but because the network "consciously and deliberately failed to take reasonable precautions to ensure that no actionably indecent material was broadcast."²⁰⁴ The FCC

¹⁹⁷ See Super Bowl Forfeiture Order, *supra* note 190, at 2765–66.

¹⁹⁸ *Id.* at 2766 (quoting Indecency Policy Statement, *supra* note 90, at 8009); see also Comm'n Proposes To Fine Young Broad. of San Francisco, Inc., Statutory Maximum for Apparent Violation of Indecency Rules, 2004 WL 135946, at *1 (Jan. 27, 2004); Tempe Radio, Inc., 12 F.C.C.R. 21,828, 21,828 (1997) (forfeiture paid); LBJS Broad. Co., 13 F.C.C.R. 20,956, 20,957 (1998) (forfeiture paid). *But see* FCC v. Pacifica Found., 438 U.S. 726, 750 (1978). See generally Indecency Policy Statement, *supra* note 90, at 8009.

¹⁹⁹ See Super Bowl Forfeiture Order, *supra* note 190, at 2766–67.

²⁰⁰ See *id.* at 2767; Super Bowl NAL, *supra* note 190, at 19,236.

²⁰¹ See Super Bowl Forfeiture Order, *supra* note 190, at 2767.

²⁰² See *id.*

²⁰³ See *id.* at 2767–68; Brief of Respondents, *supra* note 196, at 38–39.

²⁰⁴ Super Bowl Forfeiture Order, *supra* note 190, at 2768; Brief of Respondents, *supra* note 196, at 15.

found that CBS had failed to take precautions to prevent the indecent broadcast despite knowledge prior to the broadcast that the halftime show would include “some shocking moments.”²⁰⁵ CBS was found fully responsible under the doctrine of respondeat superior for the actions of the performers and the choreographer of the performance.²⁰⁶

CBS appealed the FCC’s decision to the Third Circuit, which vacated the Commission’s orders and remanded for further proceedings.²⁰⁷ On appeal, there were two significant issues. The first issue was whether the FCC acted arbitrarily and capriciously in applying a new policy that permitted a finding that the fleeting image of Jackson’s nude breast was indecent and thus actionable.²⁰⁸ CBS argued that the Commission violated the Administrative Procedure Act by not providing a reasoned explanation for its deviation from a longstanding policy not to act on isolated or fleeting material.²⁰⁹

The second issue was whether the Commission, applying theories of respondeat superior, vicarious liability, and the willfulness standard in the indecency statute, properly found CBS had violated the indecency prohibition.²¹⁰ At issue was whether CBS intended to broadcast indecent material and whether it knew that Jackson and Timberlake were planning a wardrobe reveal.²¹¹

Specifically, on appeal, CBS argued that: (1) the FCC’s forfeiture order violated the First Amendment under *Pacifica*; (2) the FCC violated its policy of only fining repeated or extended presentations of indecent material; (3) the FCC’s action violated due process and was arbitrary and capricious, specifically, the new standard the FCC currently asserts was not in place at the time of the Super Bowl, thus failing to give notice and, therefore,

²⁰⁵ Super Bowl Forfeiture Order, *supra* note 190, at 2769 (internal quotations omitted).

²⁰⁶ *Id.* at 2772. The halftime show was produced by MTV and was choreographed by a Jackson choreographer. *Id.* at 2769.

²⁰⁷ See *CBS Corp. v. FCC*, 535 F.3d 167, 171 (3d Cir. 2008); Brief of Petitioners, *supra* note 190, at 58.

²⁰⁸ See *CBS Corp.*, 535 F.3d at 171.

²⁰⁹ See 5 U.S.C. § 706 (2006); *CBS Corp.*, 535 F.3d at 171.

²¹⁰ See *CBS Corp.*, 535 F.3d at 171.

²¹¹ See Brief of Petitioners, *supra* note 190, at 28–29. Jackson and Timberlake both admitted that CBS and MTV knew nothing about their planned performance and that the stunt unfortunately just went terribly wrong from what they had planned. See *id.* at 6–7.

the FCC should have vacated the forfeiture for the same reasons it did in the subsequent fleeting expletive cases pursuant to its decision in the *Omnibus Order*,²¹² and (4) the FCC did not measure contemporary community standards.²¹³

In response, the FCC argued that its indecency orders and rules are constitutional. The agency attempted to draw a distinction between the fleeting images in this case and its prior decisions regarding fleeting expletives.²¹⁴ The Commission argued that its longstanding policy of restraint in acting on isolated and fleeting material was limited to fleeting expletives, and did not extend to the fleeting images in question during the Super Bowl XXXIII Halftime Show.²¹⁵ Broadcasting, the Commission asserted, has only limited First Amendment protection, the government's interests are substantial, and the indecency rules are narrowly tailored to those interests.²¹⁶ It offered concern about subjecting viewers to the "first blow" of indecent material as an explanation for its change of policy regarding fleeting material.²¹⁷

The Third Circuit ruled against the FCC. The Third Circuit found that the FCC acted arbitrarily and capriciously in its departure from its policy excepting fleeting material from the scope of its indecency action.²¹⁸ While not foreclosing declaratory action, the court made clear that the FCC may not penalize CBS retroactively under this new rule, which it had adopted in the later decided *Golden Globes* case.²¹⁹ The FCC petitioned the U.S. Supreme Court for certiorari but asked the Court to hold the

²¹² See *id.* at 25–28, 35–39. See generally *Omnibus Order*, *supra* note 19, at 2664.

²¹³ See Brief of Petitioners, *supra* note 190, at 40–45.

²¹⁴ See *CBS Corp.*, 535 F.3d at 183–84.

²¹⁵ See Brief of Respondents, *supra* note 196, at 28–29.

²¹⁶ See *id.* at 52–58.

²¹⁷ See Petition for a Writ of Certiorari, *supra* note 170, at 10.

²¹⁸ *CBS Corp.*, 535 F.3d at 209. Additionally, the Third Circuit found that the FCC could not impose liability on CBS for the acts of Jackson and Timberlake "under a proper application of vicarious liability and in light of the First Amendment requirement that the content of speech or expression not be penalized absent a showing of scienter." *Id.* The lack of scienter also was central to Fox's argument that the FCC's new indecency policy violates the First Amendment. See Reply Brief of Petitioner at 15–17, *FCC v. Fox Television Stations, Inc.*, 489 F.3d 444 (2d Cir. 2007) (No. 06-1760-ag).

²¹⁹ *CBS Corp.*, 535 F.3d at 178–81; see *Golden Globe Order*, *supra* note 106.

petition in abeyance, pending the Court's decision in *Fox Television Stations*.²²⁰ The case is pending decision by the Third Circuit.²²¹

c. *"NYPD Blue"*

On February 19, 2008, the FCC issued a forfeiture order against the ABC Television Network and certain affiliated stations issuing a fine in the amount of \$27,500.²²² The *NYPD Blue Forfeiture Order* sanctioned ABC's 9:00 p.m. broadcast of an episode of the police drama, which depicted a woman's naked buttocks, and a portion of her naked breast.²²³ In the scene, the woman's naked body was shown while she was taking a shower and as an eight-year-old boy looked on.²²⁴ The female's naked body parts were not obscured, blurred, or pixilated.²²⁵ The FCC cited the repeated shots of the woman's naked buttocks and the deliberate panning of the camera down her back "to reveal another full view of her buttocks before panning up again" to create a "voyeuristic" vantage point.²²⁶ The FCC also cited another camera shot in which the young boy's shocked face is depicted from between the naked woman's legs.²²⁷

In its *NYPD Blue Forfeiture Order*, the Commission affirmed its earlier decisions and concluded that the depiction of the naked female buttocks in the "NYPD Blue" episode squarely came within the subject matter scope of its indecency definition in that

²²⁰ Petition for a Writ of Certiorari at 24, *FCC v. CBS Corp.*, 129 S. Ct. 2176 (2009) (No. 08-653); see *Fox Television Stations*, 129 S. Ct. 1800; John Eggerton, *FCC, DOJ Appeal Janet Jackson to Supreme Court*, BROADCASTING & CABLE, Nov. 21, 2008, http://www.broadcastingcable.com/article/96987-FCC_DOJ_Appeal_Janet_Jackson_To_Supreme_Court.php.

²²¹ Oral arguments in the case were heard on February 23, 2010.

²²² Complaints Against Various Television Licensees Concerning Their Feb. 25, 2003 Broad. of the Program "NYPD Blue," 23 F.C.C.R. 3147, 3168 (2008) [hereinafter *NYPD Blue Forfeiture Order*]. The FCC imposed the fine only on those ABC affiliates about which the agency had received complaints resulting from the broadcast of the material outside the safe harbor. The FCC previously had issued a Notice of Apparent Liability for Forfeiture in the case. See Complaints Against Various Television Licensees Concerning Their Feb. 25, 2003 Broad. of the Program "NYPD Blue," 23 F.C.C.R. 1596 (2008) [hereinafter *NYPD Blue NAL*].

²²³ *NYPD Blue Forfeiture Order*, *supra* note 222, at 3148.

²²⁴ *NYPD Blue NAL*, *supra* note 222, at 1598–99.

²²⁵ *NYPD Blue Forfeiture Order*, *supra* note 222, at 3152. Pixilation is a popular method used to distort the resolution of an image in order to obscure it.

²²⁶ *Id.* at 3153.

²²⁷ *Id.* at 3153–54.

it described or depicted sexual or excretory organs or activities.²²⁸ Despite the fact that the buttocks is not necessarily biologically an excretory organ, the FCC has consistently concluded that it is an excretory organ for the purposes of satisfying its indecency definition.²²⁹ The FCC stated in the *NYPD Blue Forfeiture Order* that “the buttocks, which, though not physiologically necessary to procreation or excretion, are widely associated with sexual arousal and closely associated by most people with excretory activities.”²³⁰

Reviewing the context of the material in the episode and whether the material was patently offensive as measured by contemporary community standards, the FCC concluded that “notwithstanding any artistic or social merit and the presence of a parental advisory and rating,” the material was “patently offensive under the community standards for the broadcast medium.”²³¹ In reaching this conclusion, the FCC first determined that the depiction of the naked buttocks in this case was sufficiently graphic and explicit to support a finding of indecency.²³²

Next, the FCC also found that the repeated camera shots of the woman’s naked buttocks, while not as egregious as some cases the agency had reviewed, certainly rendered the episode more offensive than many cases the Commission had previously found not patently offensive.²³³ The FCC acknowledged that the depiction in the “NYPD Blue” episode was not as lengthy or as repetitive as some indecency cases where there had been a finding of patent offensiveness, but that it did contain “lengthier depictions of nudity, or more focus on nudity, than other cases involving nudity where the Commission has found that this factor did not weigh in favor of a finding of patent offensiveness.”²³⁴ Finally, in applying the third factor in determining whether material is patently offensive, the FCC concluded that the scene was pandering, titillating, and shocking

²²⁸ See *id.* at 3149.

²²⁹ See *id.* at 3150 & n.28.

²³⁰ *Id.* at 3150.

²³¹ *Id.* at 3155.

²³² *Id.* at 3152.

²³³ See *id.* at 3153.

²³⁴ *Id.*

because of the voyeuristic camera shots that panned up and down the back of the woman's naked body.²³⁵ This case has been appealed to the Second Circuit.²³⁶

d. *"Married by America"*

On February 22, 2008, the FCC issued a forfeiture order against a number of Fox affiliated stations for the broadcast of the reality show "Married by America."²³⁷ The forfeiture, in the amount of \$7,000 per station, sanctioned Fox's broadcast prior to 10:00 p.m. of the reality show featuring bachelor and bachelorette parties for two couples, all of whom prior to the show were strangers, but whom America by vote paired to be married on the show.²³⁸ The bachelor and bachelorette parties for the couples featured "sexually oriented" and suggestive performances by male and female strippers.²³⁹

The various scenes cited by the FCC in its "Married by America" forfeiture order included depictions of nude and semi-nude female and male adult entertainers grinding their crotches with partygoers, smearing and licking whipped cream from various body parts, seductively kissing breasts and other body parts, spanking partygoers with whips and belts, providing suggestive and seductive lap dances, and engaging in other sexually suggestive behavior.²⁴⁰ The FCC concluded that the depictions—many of which were pixilated to obscure naked body parts, such as buttocks, breasts, and genitals—were designed "to

²³⁵ *Id.*

²³⁶ ABC, Inc. v. FCC, No. 08-0841-ag (2d Cir. filed Mar. 26, 2008).

²³⁷ Complaints Against Various Licensees Regarding Their Broad. of the Fox Television Network Program "Married by America" on Apr. 7, 2003, 23 F.C.C.R. 3222, 3222 (2008) [hereinafter Married by America Forfeiture Order]. A Notice of Apparent Liability for Forfeiture had been issued previously on October 12, 2004. Complaints Against Various Licensees Regarding Their Broad. of the Fox Television Network Program "Married by America" on Apr. 7, 2003, 19 F.C.C.R. 20191, 20191 (2004) [hereinafter Married by America NAL]. The Enforcement Bureau denied a petition for reconsideration. Complaints Against Various Licensees Regarding Their Broad. of the Fox Television Network Program "Married by America" on Apr. 7, 2003, 23 F.C.C.R. 5699, 5699 (2008) [hereinafter Married by America Reconsideration Order].

²³⁸ See Married by America Forfeiture Order, *supra* note 237, at 3223; see also Courtney Livingston Quale, *Hear an [Expletive], There an [Expletive], But[t] . . . the Federal Communications Commission Will Not Let You Say an [Expletive]*, 45 WILLAMETTE L. REV. 207, 210 (2008).

²³⁹ See Married by America Forfeiture Order, *supra* note 237, at 3223.

²⁴⁰ *Id.* at 3224, 3227.

stimulate sexual arousal.”²⁴¹ The Commission found the material “sufficiently graphic and explicit to support an indecency finding.”²⁴² In the forfeiture order, the FCC stated that the fact that naked body parts were pixilated “did not obscure the overall graphic character of the depiction” and determined that the material should be assessed “in its full context.”²⁴³

Fox refused to pay the \$91,000 forfeiture, which has been reduced from the nearly \$1.2 million originally imposed, and asked the Commission for reconsideration.²⁴⁴ Borrowing language from the court of appeals, Fox called the fine “arbitrary and capricious, inconsistent with precedent, and patently unconstitutional.”²⁴⁵ The FCC refused to reconsider on procedural grounds.²⁴⁶ The U.S. Department of Justice has weighed in, filing suit in the D.C. Circuit, the Southern District of Iowa, the Southern District of West Virginia, and the Middle District of Tennessee against eight Fox affiliates to recover the \$7,000 forfeiture against each.²⁴⁷ The resolution of these cases likely will be influenced at least in part by the Supreme Court’s decision in *Fox Television Stations*.²⁴⁸

e. “Without a Trace”

In 2006, the FCC issued a Notice of Apparent Liability for Forfeiture against numerous CBS network affiliates for the December 31, 2004 broadcast of an episode of “Without a Trace,”

²⁴¹ *Id.* at 3225.

²⁴² *Id.* at 3226.

²⁴³ *Id.*

²⁴⁴ Press Release, Scott Grogan, Senior Vice President of Corporate Comm’n’s, Fox Broad. Co. (Mar. 24, 2008) (on file with author); see also Frank Ahrens, *Fox Refuses To Pay FCC Indecency Fine*, WASH. POST, Mar. 25, 2008, at D01. The \$91,000 forfeiture was to be paid by March 22, 2008. Upon receipt of a forfeiture, licensees generally have two options available: (i) pay and appeal the fine, or (ii) do not pay the fine and later mount a defense in a trial de novo should the government seek to collect the amount of the forfeiture. See Bryan N. Tramont, *Too Much Power, Too Little Restraint: How the FCC Expands Its Reach Through Unenforceable and Unwieldy “Voluntary” Agreements*, 53 FED. COMM’NS L.J. 49, 64 (2000).

²⁴⁵ Ahrens, *supra* note 244 (internal quotation marks omitted).

²⁴⁶ See *Married by America* Reconsideration Order, *supra* note 237, at 5699.

²⁴⁷ See John Eggerton, *FCC Kicks Back Fox’s Married by America Appeal*, BROADCASTING & CABLE, Apr. 4, 2008, http://www.broadcastingcable.com/article/113150-FCC_Kicks_Back_Fox_s_Married_by_America_Appeal.php.

²⁴⁸ 129 S. Ct. 1800 (2009).

which depicted teenagers engaged in sexual acts.²⁴⁹ The episode involved “an FBI investigation into the disappearance and possible rape of a high school student.”²⁵⁰ In a flashback scene, viewers were taken back to the scene of a teenage sex party that included depictions of couples and groups of teenagers engaged in various sex acts.²⁵¹ There was no actual nudity, but teenagers were depicted partially unclothed.²⁵² The scene depicted intercourse between the teenagers.²⁵³ The final scene in the flashback depicted the victim in a bra and panties straddling a male.²⁵⁴ Two other males were kissing her breasts and the victim was moving up and down on the male who was shown thrusting his hips into the victim’s crotch.²⁵⁵

Even though there was no actual nudity, the FCC concluded that the depiction of sexual activity was shocking, intended to titillate, and patently offensive under contemporary community standards.²⁵⁶ The FCC proposed a fine totaling \$3,633,500 against the CBS affiliates.²⁵⁷ As demonstrated, herein, the status of the constitutionality of the fleeting expletives and images policy is very much unsettled with the aforementioned cases as well as many others pending resolution either in the courts or at the Commission.

2. Profane Material

Traditionally, the courts and the FCC defined profanity as blasphemy.²⁵⁸ The Commission adopted a new definition in 2004 in its *Golden Globes Order*, which broadened the definition of

²⁴⁹ See Complaints Against Various Television Licensees Concerning Their Dec. 31, 2004 Broad. of the Program “Without a Trace,” 21 F.C.C.R. 2732, 2732 (2006) [hereinafter Without a Trace NAL].

²⁵⁰ *Id.* at 2735.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 2235–36.

²⁵⁷ *Id.* at 2759 (Attachment A). The Notice of Apparent Liability for Forfeiture later was cancelled against eight licensees. See Complaints Against Various Television Licensees Concerning Their Dec. 31, 2004 Broad. of the Program “Without A Trace,” 21 F.C.C.R. 3110 (2006).

²⁵⁸ See *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 452 (2d Cir. 2007), *rev’d*, 129 S. Ct. 1800 (2009); *Gagliardo v. United States*, 366 F.2d 720, 725 (9th Cir. 1966); *Duncan v. United States*, 48 F.2d 128, 134 (9th Cir. 1931); Complaint by Appleton, 28 F.C.C.2d 36, 37 (1971).

profanity to include speech beyond that which might be considered blasphemous.²⁵⁹ The definition adopted in 2004 defined profane as “those personally reviling epithets naturally tending to provoke violent resentment or . . . language so grossly offensive to members of the public who actually hear it as to amount to a nuisance.”²⁶⁰ This new definition was overturned by the Second Circuit in *Fox Television Stations*, where the Second Circuit vacated and remanded the Commission’s *Omnibus Remand Order*.²⁶¹ The Second Circuit found that the FCC’s new definition of “profane” “substantially overlap[s] with the statutory term ‘indecent’ . . . render[ing] the statutory term ‘indecent’ superfluous.”²⁶² No new definition has been adopted, nor was the issue raised in the Commission’s petition for writ of certiorari in the U.S. Supreme Court.²⁶³

²⁵⁹ Golden Globe Order, *supra* note 106, at 4981.

We recognize that the Commission’s limited case law on profane speech has focused on what is profane in the context of blasphemy, but nothing in those cases suggests . . . that the statutory definition of profane is limited to blasphemy . . . Broadcasters are on notice that the Commission in the future will not limit its definition of profane speech to only those words and phrases that contain an element of blasphemy or divine imprecation, but, depending on the context, will also consider under the definition of “profanity” the “F-Word” and those words (or variants thereof) that are as highly offensive as the “F-Word,” to the extent such language is broadcast between 6 a.m. and 10 p.m. We will analyze other potentially profane words or phrases on a case-by-case basis.

Id. (footnotes omitted). Like indecent material, profane material may only be broadcast during the safe harbor hours of 1:00 p.m. to 6:00 a.m.

²⁶⁰ *Id.* (quoting *Tallman v. United States*, 465 F.2d 282, 286 (7th Cir. 1972)); *see also* *FCC v. Pacifica Found.*, 438 U.S. 726, 750 (1978) (approving FCC decision based on nuisance rationale). The Court, in *Pacifica*, decided the case based on principles similar to the law of public nuisance, which favors channeling behavior over outright prohibitions. The Court favored channeling material that depicts or describes sexual or excretory activity in a patently offensive way to times of the day when children are less likely to be in the audience. *Id.* at 731–32, 750. While 47 U.S.C. § 326 prohibits government censorship of broadcast material prior to its broadcast, it does not prohibit the FCC from reviewing the content of broadcast material after the fact and sanctioning licensees who broadcast indecent, obscene, or profane material. *See* 47 U.S.C. § 326 (2006); *Pacifica*, 438 U.S. at 735–38.

²⁶¹ *Fox Television Stations*, 489 F.3d at 466–67.

²⁶² *Id.* at 467 (“[O]ur cannons of statutory construction do not permit such an interpretation . . .”).

²⁶³ *See* Petition for a Writ of Certiorari, *supra* note 170, at 11; *see also* Brief of Petitioner, *supra* note 170.

3. Obscene Material

While indecent and profane material receive limited First Amendment protection, obscene material does not and, therefore, may not be broadcast at any time on broadcast stations nor on cable or satellite channels.²⁶⁴ The Supreme Court has opined that to be found obscene, material must meet a three-prong test: (1) an average person, applying contemporary community standards, must find that the material, as a whole, appeals to the prurient interest, in other words, material having a tendency to excite lustful thoughts;²⁶⁵ (2) the material must depict or describe, in a patently offensive way, sexual conduct specifically defined by applicable law; and (3) the material, taken as a whole, must lack serious literary, artistic, political, or scientific value.²⁶⁶ The Supreme Court has indicated that this test is designed to cover hardcore pornography and not other forms of indecent or offensive speech.²⁶⁷

While the definitions of broadcast indecency, profanity, and obscenity are litigated and refined, the Commission has held off on ruling on cases involving these issues. How they are resolved will have a direct impact on whether the statutory conflict as applied to broadcast political advertisements continues.

²⁶⁴ See *Miller v. California*, 413 U.S. 15, 23 (1973); *Roth v. United States*, 354 U.S. 476, 485 (1957). Separate statutes prohibit the distribution and transmission of obscene material on cable and satellite television services. See 18 U.S.C. § 1468 (2006) (prohibiting distribution of obscene material on cable and satellite television); 47 U.S.C. § 559 (2006) (prohibiting transmission of obscene material on cable services); see also 47 U.S.C. §§ 532(h), 544(d), 558 (2006). 18 U.S.C. § 1468(a) (2006) reads, "Whoever knowingly utters any obscene language or distributes any obscene matter by means of cable television or subscription services on television, shall be punished by imprisonment for not more than 2 years or by a fine in accordance with this title, or both." 47 U.S.C. § 559 reads, "Whoever transmits over any cable system any matter which is obscene or otherwise unprotected by the Constitution of the United States shall be fined under Title 18 or imprisoned not more than 2 years, or both."

²⁶⁵ *Roth*, 354 U.S. at 487 n.20, 489.

²⁶⁶ See *Miller*, 413 U.S. at 24.

²⁶⁷ See, e.g., *id.* at 23–25; *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 54 (1973) ("This Court has consistently held that obscene material is not protected by the First Amendment as a limitation on the state police power by virtue of the Fourteenth Amendment."); *Jacobellis v. Ohio*, 378 U.S. 184, 201 (1964) (Warren, C.J., dissenting).

II. IMMUNITY AND POSSIBLE "EXCEPTIONS" TO THE POLITICAL BROADCAST RULES

Despite the absence of express exceptions in the statutory language, courts have applied what amount to indecency exceptions to the political broadcast rules. Congress has never recognized a clear exception to the political broadcast rules or the indecency statutes. The Supreme Court has recognized broadcasters' immunity from liability for defamatory content in broadcast advertisements aired in accordance with political broadcast rules.²⁶⁸ The rationale offered for exception and immunity could be applicable to all political advertisements and thus resolve the conflict between the three statutes that are the subject of this Article.

A. *Broadcaster Immunity for Political Speech Where Censoring Is Prohibited*

In *Farmers Educational & Cooperative Union of America v. WDAY, Inc.*, a broadcast licensee sought to remove defamatory material from speeches made by legally qualified candidates for political office.²⁶⁹ Presuming that 47 U.S.C. § 315 was interpreted to ban such censorship of political speeches, the broadcaster sought legal immunity from suit for broadcast of the libelous statements.²⁷⁰ In *WDAY*, the Supreme Court affirmed the equal opportunity mandate of § 315, opining that the basic purpose of § 315 is "full and unrestricted discussion of political issues by legally qualified candidates."²⁷¹ Additionally, in holding that § 315 prohibits censorship, the Court in *WDAY* aptly recognized that the broadcaster is faced with a difficult decision in deciding whether to censor political material in violation of § 315 or to risk being found guilty of libel or defamation.²⁷²

²⁶⁸ See *Farmers Educ. & Coop. Union of Am. v. WDAY, Inc.*, 360 U.S. 525 (1959).

²⁶⁹ *Id.* at 529.

²⁷⁰ *Id.* at 526-27. *Sorensen v. Wood*, 243 N.W. 82, 85 (Neb. 1932), the first judicial decision to address the issue of immunity from a libel suit, said that a broadcaster could delete defamatory statements from political speech. Cases since *Sorensen* uniformly have reversed course, instead recognizing broadcaster immunity from libel suits relating to the broadcast of political advertisements. See Jack H. Friedenthal & Richard J. Medalie, *The Impact of Federal Regulation on Political Broadcasting: Section 315 of the Communications Act*, 72 HARV. L. REV. 445, 480-81 (1959).

²⁷¹ *WDAY*, 360 U.S. at 529.

²⁷² *Id.* at 530-31.

The lack of certainty as to the possible success of defenses to libel and the natural inclination to err on the side of caution, the Court opined, thereby either intentionally or unintentionally chills speech.²⁷³ Because time often is of the essence, thereby heightening the angst of broadcasters faced with this choice, and because of the nature of political campaigns and the limited time period of election seasons, a candidate and a broadcaster may not resolve the issue before voters take to the polls.²⁷⁴ Therefore, the holding in *WDAY* provides a reasonable and workable resolution of the broadcasters' dilemma when presented with political speech containing defamatory material.

The Court in *WDAY* relied on legislative history and what it concluded was Congress's intended purpose of fostering public discussion of political issues and of not placing unreasonable burdens on broadcasters, which play such an important role in the political process.²⁷⁵ The Court in *WDAY*, therefore, recognized immunity from defamation suits where a broadcaster airs a political advertisement that defames an opposing candidate.²⁷⁶ No such immunity has been recognized for the broadcast of indecent material contained in political advertisements.

B. "Exceptions" to the Political Broadcast Rules

Courts and the FCC have addressed claims that certain political material is indecent and potentially harmful to children.²⁷⁷ In 1992, the FCC and the U.S. District Court for the Northern District of Georgia interpreted the indecency provisions of 18 U.S.C. § 1464 to be exceptions to the reasonable access, censorship, and equal opportunities provisions of § 312 and

²⁷³ *Id.* at 530.

²⁷⁴ *See id.*

²⁷⁵ *Id.* at 528 nn.5–6, 530. The FCC has agreed, and legislative history supports this conclusion.

²⁷⁶ *Id.* at 531. The Court affirmed the conclusion of the North Dakota Supreme Court, which said that "[s]ince power of censorship of political broadcasts is prohibited it must follow as a corollary that the mandate prohibiting censorship includes the privilege of immunity from liability for defamatory statements made by the speakers." *Id.* at 527 (quoting *Farmers Educ. & Coop. Union v. WDAY, Inc.*, 89 N.W.2d 102, 110 (N.D. 1958)).

²⁷⁷ *See, e.g., Stoner II*, *supra* note 19, at 944–45; Mass Media Bureau Letter to Kaye Scholer, *supra* note 19, at 5599–600.

§ 315.²⁷⁸ In this early case, the FCC and the U.S. District Court concluded that licensees were not obligated to broadcast indecent political speech outside the safe harbor.²⁷⁹ This conclusion ultimately was overturned by the D.C. Circuit in *Becker v. FCC*.²⁸⁰

In two 1992 U.S. congressional races, Daniel Becker of Georgia and Michael Bailey of Indiana, attempting to convey their anti-abortion stances, broadcast television campaign advertisements depicting aborted fetuses. The advertisements seemed specifically designed to repulse viewers and voters and to sink the campaigns of their pro-choice opponents. The broadcast stations in both cases received numerous complaints about the gruesome images depicted over the broadcast airwaves. At least one broadcaster asked the FCC to declare the advertisements

²⁷⁸ See, e.g., *Gillett Comm'ns of Atlanta, Inc. v. Becker*, 807 F. Supp. 757, 762 (N.D. Ga. 1992) (citing Memorandum by FCC Staff, Jan. 6, 1984, and granting declaratory and injunctive relief and holding (1) that the prohibition against the broadcast of indecent material was an exception to the reasonable access, equal opportunities, and anti-censorship provisions; (2) that the abortion advertisement was indecent; and (3) that a broadcaster could channel the abortion advertisement to the safe harbor).

²⁷⁹ See Mass Media Bureau Letter to Kaye Scholer, *supra* note 19 (ruling on a petition for declaratory ruling regarding anti-abortion political advertisement, the Mass Media Bureau declined to rule that abortion advertisements as a class are indecent, declined to foreclose warnings to viewers regarding contents of political advertisements that might be harmful to children, but found channeling of political advertisements that are not indecent to be in violation of reasonable access requirements); see Public Notice Request for Comments, Petition for Declaratory Ruling Concerning Section 312(a)(7) of the Commc'ns Act, 7 F.C.C.R. 7297 (Oct. 30, 1992). The Commission determined that further and comprehensive review of the issue was necessary, writing:

Specifically, we seek comment on all issues concerning what, if any, right or obligation a broadcast licensee has to channel political advertisements that it reasonably and in good faith believes are indecent. We also seek comment as to whether broadcasters have any right to channel material that, while not indecent, may be otherwise harmful to children. In this latter respect, we specifically invite commenters to address the proper scope of any such right and the standard by which the Commission should evaluate the reasonableness of broadcasters' judgments rendered in exercising that right.

Id. The FCC later affirmed the Mass Media Bureau's decision that: (1) the abortion imagery was not indecent under § 1464; (2) the material could be psychologically damaging to children; (3) that § 312(a)(7) does not preclude channeling; and (4) that § 312(a)(7) does not violate the no censorship mandate of § 315. See also Petition for Declaratory Ruling Concerning Section 312(a)(7) of the Commc'ns Act, 9 F.C.C.R. 7638 (1994).

²⁸⁰ 95 F.3d 75, 84-85 (D.C. Cir. 1996) (vacating FCC ruling in Petition for Declaratory Ruling, *supra* note 279).

indecent and to permit broadcasters to channel those advertisements to hours when children were less likely to be in the viewing audience. The FCC concluded that the abortion depictions were not indecent, but that because of the potential psychological harm to children, § 312(a)(7) did not preclude a broadcaster from exercising its discretion to channel the advertisement or airing it at a time that would be less detrimental to children.²⁸¹ Additionally, the FCC concluded that channeling the potentially psychologically harmful advertisement did not violate the prohibition against censorship in § 315.²⁸²

The D.C. Circuit, in *Becker*, concluded that § 312(a)(7) and § 315 actually override programming discretion ordinarily allowed licensees by the Communications Act.²⁸³ In other words, pursuant to § 312(a)(7) and § 315, broadcasters must provide reasonable access on equal terms without censorship to political candidates for federal office despite the fact that the broadcaster might find the material in the political advertisement indecent, obscene, or profane. Unfortunately, the law does not expressly provide that broadcasters may not be found liable for violation of § 1464 for the broadcast of such political advertisement featuring material ultimately found indecent, obscene, or profane. There is no clear exception. This unfortunate loophole presents the dilemma facing broadcasters.

The D.C. Circuit in *Becker*, on review of the FCC ruling, grappled with the question of whether the portrayals of aborted fetal tissue—material that was not considered indecent—could be

²⁸¹ See Petition for Declaratory Ruling, *supra* note 279 at 7643 (finding that the depictions of aborted fetuses did not depict sexual or excretory organs or activities); see also *Becker*, 7 F.C.C.R. 7282 (1992). With regard to the “Abortion in America: The Real Story” program, the FCC stated:

The instant case presents the . . . question of whether a licensee in the absence of a Commission ruling as to whether a given political commercial is or is not indecent, may nonetheless channel the advertisement to the indecency safe harbor where it reasonably and in good faith determines that the ad is indecent . . . Under these circumstances, and until the Commission provides definitive guidance, the staff believes it would not be unreasonable for the licensee to rely on the informal staff opinion referred to above and conclude that Section 312(a)(7) does not require it to air, outside the ‘safe harbor,’ material that it reasonably and in good faith believes is indecent.

Id. at 7282.

²⁸² Petition for Declaratory Ruling, *supra* note 279, at 7649.

²⁸³ See *Becker*, 95 F.3d at 82.

channeled to the safe harbor hours when children are less likely to be in the viewing audience.²⁸⁴ The court struggled with the tension between the competing interests of children, broadcast licensees, the voting public, and political candidates exercising their right of "access to time periods with the greatest audience potential."²⁸⁵ The D.C. Circuit stated in *Becker* "[w]e are faced, then, with competing interests—the licensee's desire to spare children the sight of images that are not indecent but may nevertheless prove harmful, and the interest of a political candidate in exercising his statutory right of 'access to the time periods with the greatest audience potential.'"²⁸⁶ The D.C. Circuit observed that in light of this statutory conflict, the FCC has afforded licensees the final say in deciding in favor of children.²⁸⁷

As a threshold matter, the D.C. Circuit concluded that the advertisement was not indecent because it did not fit the FCC's definition.²⁸⁸ Additionally, the D.C. Circuit held in *Becker* that channeling of political advertisements, even those containing abortion-related content, to the safe harbor is not permitted as such action would offend political broadcasting rules providing political candidates reasonable and equal access to broadcast outlets, as well as violate laws prohibiting censorship of political speech.²⁸⁹ The court concluded that channeling the abortion advertisements to the safe harbor violated both § 312(a)(7) and § 315 by "permitting content-based channeling of non-indecent political advertisements, thus denying qualified candidates the access to the broadcast media envisioned by Congress."²⁹⁰ Broadcasters could not deny a candidate access to adult

²⁸⁴ *Becker*, 95 F.3d at 77–78, 80.

²⁸⁵ *Id.* at 80 (citing Licensee Responsibility, *supra* note 50, at 517).

²⁸⁶ *Id.* (citing Licensee Responsibility, *supra* note 50, at 517). The gruesome images pose potentially greater psychological harm to children than would exposure to the naked body parts of living people.

²⁸⁷ *Id.*; Petition for Declaratory Ruling, *supra* note 279, at 7646.

²⁸⁸ *See Becker*, 95 F.3d at 84–85.

²⁸⁹ *See id.* at 80. *But see* Gillett Commc'ns of Atlanta, Inc. v. Becker, 807 F. Supp. 757, 764 (N.D. Ga. 1992), *appeal dismissed*, Gillett Commc'ns v. Becker, 5 F.3d 1500 (11th Cir. 1993). The U.S. District Court for the Northern District of Georgia granted a broadcaster injunctive and declaratory relief regarding the broadcast of a potentially indecent political advertisement, finding that the material was indecent because it described excretory activity and material. *See id.* at 765. The court of appeals vacated and remanded without opinion, letting the District Court's decision stand. *Becker*, 95 F.3d at 84–85.

²⁹⁰ *Becker*, 95 F.3d at 84–85.

audiences just because children might be in the audience.²⁹¹ In this case, the D.C. Circuit seems to have implied an exception to the indecency rules for political advertisements. However, neither the court nor either of the statutes in question expressly provide for such an exception.

This issue also was presented in notable cases involving political advertisements laden with racist and otherwise offensive language.²⁹² In response to the racist tirades of U.S. senatorial candidate J.B. Stoner in the 1970s, the NAACP asked the FCC to ban the word “nigger” as obscene or indecent in accordance with the U.S. Supreme Court’s holding in *Pacifica*.²⁹³ The NAACP misunderstood the Court’s holding in *Pacifica* to apply to racist hate speech. In response, the FCC concluded that use of the racial epithet “nigger” is neither indecent nor obscene under its rules.²⁹⁴ No matter how offensive the term, it describes neither sexual organs, sexual or excretory activity, nor sexual conduct in a patently offensive manner as is required pursuant to the agency’s rules.

The most important conclusion the FCC reached in rejecting the NAACP’s claim in response to the racist speech of J.B. Stoner was that “even if the Commission were to find the word ‘nigger’ to be ‘obscene’ or ‘indecent,’ in light of Section 315 we may not prevent a candidate from utilizing that word during his ‘use’ of a licensee’s broadcast facilities.”²⁹⁵ The Commission has not as forcefully stated this conclusion since *Stoner II*. This single sentence highlights the broadcaster’s dilemma. Use of certain language is certain to be offensive to many of a broadcaster’s audience, and indeed to the broadcaster also; however, because of the right of equal opportunity to all candidates for the same public office and the prohibition against censorship of political advertisements by a broadcaster, the broadcaster must for the sake of the political process and the rights of the candidate allow even the most offensive racist federal candidate to use the public airwaves broadcast facilities to spew hate, spread discontent, and generally offend the public. Neither the issue of indecent

²⁹¹ See *id.* at 79–80.

²⁹² *Stoner I*, *supra* note 19; *Stoner II*, *supra* note 19.

²⁹³ *FCC v. Pacifica Found.*, 438 U.S. 726, 738–51 (1978); *Stoner II*, *supra* note 19, at 943–44.

²⁹⁴ *Stoner II*, *supra* note 19, at 944–45.

²⁹⁵ *Id.* at 944; see also *Reed-Huff*, *supra* note 20.

political speech nor the conclusion suggested by the dicta in the case of J.B. Stoner's advertisement, however, have ever been clearly addressed by the courts. The Commission seems to have created an implicit exception to the indecency prohibition for political advertisements.²⁹⁶ However, such an exception never has been expressly stated.

III. THE ANTI-FORD AND ANTI-ARCURI ADVERTISEMENTS PROBABLY ARE FLEETING AND NOT INDECENT

The anti-Arcuri and anti-Ford advertisements probably are not indecent, as they do not meet the current definition of indecent material, nor are they patently offensive as measured by contemporary community standards. Nevertheless, they signal a change in tone and content of political advertisements. They also signal the ushering in of a new era of political campaigning in which candidates, political action committees, and corporations are more willing to use sex to sink an opponent's campaign efforts.

A. *The Advertisements, While Offensive, Do Not Meet the Current Definition of Indecency*

While the anti-Ford and the anti-Arcuri advertisements are offensive, racist, and/or sexually suggestive, neither advertisement is indecent, obscene, or profane as defined by statutory and regulatory law. Neither the anti-Ford nor the anti-Arcuri advertisements describe or depict sexual or excretory organs or activities. The depiction in the anti-Ford advertisement presents a suggestion of nudity but no actual depiction of sexual or excretory organs. Only the bare shoulders of the young blonde woman are shown on camera.²⁹⁷ While the anti-Arcuri advertisement shows a stripper appearing to perform a suggestive dance, only the woman's silhouette is depicted on camera, and she is not engaged in any actual sex act.²⁹⁸

Consequently, they do not fall neatly within the context of the FCC's indecency definition. Additionally, even if they were found to be indecent, they very well could be found to be fleeting and isolated indecent material, the actionability of which will

²⁹⁶ See Stoner II, *supra* note 19.

²⁹⁷ See *Too Hot for Corker*, *supra* note 1.

²⁹⁸ See *Bad Call*, *supra* note 2.

turn on judicial decisions and the Commission's response. These advertisements, however, are precursors to future political speech that might fall within that definition. Not satisfying the definition of indecency, the FCC could not have sanctioned a licensee who decided to broadcast either of these advertisements. The advertisements admittedly do not present broadcasters the exact legal dilemma contemplated by scholars and courts, but they definitely signal a shift in that direction. It likely is only a matter of time before broadcasters face the situation that will force them to make this tough choice between competing statutory obligations.

B. Patent Offensiveness in Context and as Measured by the Community Standard

Assuming for a moment that the advertisements were deemed indecent and that the second part of an indecency analysis—whether the material is patently offensive under contemporary community standards—should be considered. As discussed above, determinations of whether broadcast material is indecent “[are] largely a function of context.”²⁹⁹ Context was taken into consideration when Bono used the expletive to describe just how happy he was to receive a Golden Globe award.³⁰⁰ Context was considered in the Janet Jackson and Justin Timberlake Super Bowl XXXVIII performance.³⁰¹ Therefore, the context in which the anti-Ford and anti-Arcuri advertisements arose also must be considered.

In these cases, the context obviously is the political process and specifically a political campaign for a United States political office. While public opinion of politicians often is less than laudatory, the public's disappointment with the conduct of politicians is grounded in the notion, in theory, that on a certain level we hold them to a higher standard as administrators of the public trust. While we understand that politics can be a dirty business, the mudslinging in political advertisements historically has been contained to casting aspersions on an opponent's character in the form of attacks on their political, social, and economic policies. Because of technological advances—namely

²⁹⁹ See *FCC v. Pacifica Found.*, 438 U.S. 726, 742 (1978).

³⁰⁰ See Enforcement Bureau Golden Globes Decision, *supra* note 126, at 19,861.

³⁰¹ See *CBS Corp. v. FCC*, 535 F.3d 167, 171 (3rd Cir. 2008), *vacated*, 129 S. Ct. 2176 (2009).

the popularity of twenty-four hour news programming and the public's greater access to information provided by citizen journalists on Internet websites—what used to be behind closed door, private, and personal matters have now become much more public and widely available for considerable public consumption.³⁰² No matter how inappropriate a forum the political campaign arena for gratuitous, titillating, and suggestive sexual speech, candidates and politicians do continually seem to be caught up in scandal involving sexual misconduct that in some cases does have some bearing on their suitability for public office. Presumably, opposing candidates and their supporters would like to be able to capitalize on those transgressions, and cash-strapped broadcasters might welcome the revenues to be collected from those advertisements.

1. The Material Is Not Explicit or Graphic

The material in the anti-Ford and anti-Arcuri advertisements is neither explicit nor graphic. As discussed above, there is no actual nudity or any depiction of explicit or graphic sexual activity.

2. The Images Are Fleeting and Do Not Dwell or Repeat at Length

The material in the anti-Ford advertisement does not dwell on nor repeat at length descriptions of sexual organs or activities. The image, although repeated once, does not do so at length. The image of the woman with bare shoulders appears on the screen only for a few seconds.³⁰³ An argument could be made that the material in the anti-Arcuri advertisement does dwell at length on the image of the woman appearing to perform an erotic dance. However, the woman is not naked, and there is no actual depiction of sexual activity.³⁰⁴ The material in both advertisements could be characterized as fleeting in nature. Under the pre-Golden Globes FCC indecency policy, this would not be subject to FCC enforcement action. Under the newly

³⁰² See generally Wolff, *supra* note 25.

³⁰³ See *Too Hot for Corker*, *supra* note 1.

³⁰⁴ See *Bad Call*, *supra* note 2.

adopted policy, the fact that the material is fleeting would not insulate it from agency enforcement action if, in the unlikely event, it were found to fit the definition of indecency.

3. The Material Is Not Intended To Pander or Titillate, but Perhaps To Shock

The anti-Ford and anti-Arcuri advertisements do pander, titillate, and arouse viewers. They are intended to and do arouse our racial prejudices, fears, and/or willingness to stereotype. These images probably were intended to shock viewing audiences. In that way, they are just as, if not more, harmful to children, the political process, and society at large as any other sexual content on broadcast television because such inflammatory advertisements are presented in a serious context with the intent to confuse an already media-overwhelmed and media-saturated electorate. While the depictions in both the anti-Ford and anti-Arcuri advertisements are offensive and gratuitous, they, however, probably were not intended to pander, titillate, or sexually arouse the viewers. Instead, they were intended to taint the image of both Ford and Arcuri as well as their chances of victory respectively. In the case of Ford, the advertisement likely was intended to evoke racial images and prejudicial thoughts against Ford.

Television content in general has become much racier. Additionally, sexually suggestive material is commonplace on broadcast, cable, and satellite television, as well as on the Internet, particularly when websites such as YouTube, MySpace, and Facebook³⁰⁵ are factored into the analysis.³⁰⁶ The bar has been set very low. Compared to regularly scheduled primetime programming, today's political advertisements still probably would be considered appropriate for general audiences including children. The regular prime time line up on the big four broadcast networks, on the other hand, provides a steady diet of

³⁰⁵ MySpace and Facebook are social networking websites that allow users to post photographs, videos, and various personal information.

³⁰⁶ The CBS network aired a racy program titled "Swingtown" during the summer of 2008. The show featured the lives of adults who engage in the "swinger" lifestyle, which involves having sex with multiple partners. Groups like the Parents Television Council voiced opposition to the program. *See, e.g.*, Press Release, Parents Television Council, PTC Urges CBS Affiliate To Pre-empt "Swingtown" (June 9, 2008), available at <http://www.parentstv.org/PTC/news/release/2008/0609.asp> (last visited Apr. 11, 2010).

sex, violence, and generally base programming. Programming on cable television generally is even more permissive, particularly when the excessive drinking and sexually suggestive material commonplace in many reality shows are factored in.³⁰⁷

The race to the bottom with respect to the quality of television programming also might reflect a growing tolerance in American society for the crass, suggestive, and base material streamed into our households every minute of every day.³⁰⁸ There is, after all, no huge ground swell of public outrage. The majority of indecency complaints received by the FCC in recent years have originated from one watchdog organization, the Parents Television Council.³⁰⁹

Americans, in large part, seem to have become desensitized to sexualized material on television. Advertisements for condoms, breast enlargement, erectile dysfunction medications, and other products touting the ability to enhance intimate satisfaction can be seen on television all day long, even during times of the day when children are very likely to be in the viewing audience. The number of sex scandals involving public figures and the twenty-four hour news coverage of these scandals has brought the language of sex to a prominent place in contemporary news coverage. This material routinely crawls across the bottom of the television screen on morning news

³⁰⁷ Cable and satellite enjoy greater freedom to broadcast indecent material that would be banned on broadcast stations. The Internet is largely unregulated in almost all respects.

³⁰⁸ See Edward Wyatt, *It Turns out You Can Say that on Television, over and over*, N.Y. TIMES, Nov. 14, 2009, at A1 (discussing the increased use of crass language on television). On the other hand, there are thousands of indecency complaints pending at the FCC which presumably are awaiting the resolution of the issue of whether the policy of sanctioning fleeting material violates the First Amendment. See John Eggerton, *FCC Tackles Backlog of Indecency Inquiries*, BROAD. & CABLE, Mar. 8, 2010.

³⁰⁹ See Sharokh Sheik, *FCC Indecency Violations: Should the FCC Be Able To Fine Non-Broadcast Licensees for Indecency Violations?*, 35 SW. U. L. REV. 457, 472 (2006). The Parents Television Council is an "advocacy organization, [p]rotecting children against sex, violence, and profanity in entertainment." Parents Television Council, *Home Page*, <http://www.parentstv.org/welcome.asp> (last visited Apr. 20, 2010). The Parents Television Council makes it incredibly easy for visitors to its website to file indecency complaints with the FCC. The website provides multiple links directly to the FCC. See, e.g., Parents Television Council, *Broadcast Indecency Campaign*, <https://www.parentstv.org/PTC/fcc/fcccomplaint.asp> (last visited Apr. 20, 2010).

television programs. The details of the alleged sex acts are openly discussed at all times of the day by television newscasters.³¹⁰

Due to our exposure to crass and coarse television programming, the American public in many ways has developed immunity to this type of material that has invaded the homes and the minds of all viewers, not just children.³¹¹ This permissive trend suggests that content is less and less likely to offend the contemporary community standard. When the broader availability of and subscription to cable, satellite, and high-speed Internet services is factored in, our collective resistance to indecent material becomes even more evident.

With this desensitization comes the fear that the American public has lost the ability to be discerning regarding indecent material. FCC policy, however, historically has been highly protective of children, seeking to shield them from the potentially harmful effects of excessive sexual content in broadcast radio and television programming. Free over-the-air broadcasting has a uniquely special place in the American marketplace of ideas.³¹² It is available to everyone regardless of economic status. Many households have abandoned subscription services altogether due to the questionable content and otherwise prohibitive costs associated with those subscription services. Preserving at least one relatively safe venue—over-the-air broadcasting—for balanced, relatively innocuous programming is important to the democracy. There are no separate standards for entertainment programming and advertising content, but as it relates to a matter as socially important as informing the voting public, perhaps there should be. Perhaps broadcasting should be held to a higher standard than other programming platforms. Similarly, perhaps political advertisements also should be held to a higher standard than other content. The pressing legal and policy question, though, is whether the government and broadcasters should be making these determinations for the public.

³¹⁰ See, e.g., *Reliable Sources* (CNN television broadcast Dec. 27, 2009), available at <http://www.cnn.com/video/#/video/politics/2009/12/27/2009.the.age.of.sex.scandals.cnn?iref=allsearch> (showing a montage of television discussions of 2009 sex scandals).

³¹¹ See *id.*

³¹² *FCC v. Pacifica Found.*, 438 U.S. 726, 742 (1978).

Additionally, the fact that the political advertisements in question are aired by an increasingly consolidated and corporate-controlled media is relevant to this analysis. Consolidation in the news industry has resulted in fewer traditional sources and outlets distributing what historically have been viewed as reliable information based on sound journalistic principles. So, a possibly less discerning electorate is being fed a diet of news and information by an increasingly smaller subset of sources and outlets.

Although there are no outright bona fide news exemptions to the indecency prohibition, if the FCC begins to recognize exceptions to the indecency rule, the exceptions could threaten to swallow the rule prohibiting the broadcast of indecent material.³¹³ Its handling of "The Early Show" demonstrates a willingness to extend these exemptions.³¹⁴ Recognition of formal exceptions to the indecency prohibition would extend the obscenity exceptions for artistic expression, bona fide news coverage, documentaries, news interviews, and of course political speech to indecency and profanity.³¹⁵ Should this happen, an argument could be made that there is no compelling reason for maintaining the indecency rule.

IV. RESOLUTION OF THE STATUTORY CONFLICT IS POSSIBLE

To date, Congress and the FCC have left unresolved the question of whether a broadcaster will be subject to criminal prosecution in "future election-related conflicts" where the political speech is indeed indecent under the FCC's and courts' definition of the term.³¹⁶ In light of the possibility of a questionably indecent political advertisement, however remote or far in the distant future, a legally sound solution is warranted. If the Second and Third Circuits and/or the Supreme Court vacate the indecency rules altogether, then this case is closed. There will be no conflict. If the courts uphold the pre-Golden Globes indecency rules, then a resolution of the statutory conflict is necessary. Either the FCC, Congress, or lower courts will have

³¹³ Omnibus Remand Order, *supra* note 89.

³¹⁴ Discussed *supra* at Part I.C.1.a.

³¹⁵ See, e.g., *Miller v. California*, 413 U.S. 15, 24 (1973); 47 U.S.C. § 315 does include exceptions for a bona fide news cast, bona fide news interview, bona fide documentary, and on the spot coverage of bona fide news events.

³¹⁶ See Mortlock, *supra* note 19, at 211-12.

to revisit this issue seeking to resolve the statutory dilemma. Congress could resolve this dilemma in one of a number of different ways.³¹⁷

In her comment, Samantha Mortlock correctly characterizes the broadcasters' dilemma and proposes reasonable resolutions of the conflict.³¹⁸ She suggests that this statutory conflict may be resolved by either amending, clarifying, or repealing the political broadcast rules or by granting immunity to broadcasters.³¹⁹ It also has been suggested that Congress could amend the reasonable access and equal opportunity statutes to expressly exclude political advertisements that include indecent, obscene, or profane material, effectively banning all broadcast indecency, including that in political advertisements. Second, Congress could expressly create an exception to the anti-censorship provisions of § 326 and § 315 of the Communications Act, thus permitting broadcasters to channel indecent political advertisements to the safe harbor. Third, Congress simply could repeal entirely the reasonable access and equal opportunities provisions.

In addition to those proposals already offered, there are some other possible resolutions of this statutory conflict. First, Congress or the courts could carve out an express exception to the indecency prohibition for political advertisements. Congress

³¹⁷ See *id.* at 221–25; see also Lili Levi, *The FCC, Indecency, and Anti-Abortion Political Advertising*, 3 VILL. SPORTS & ENT. L.J. 85, 219 (1996); Milagros Rivera-Sanchez & Paul H. Gates, Jr., *Abortion on the Air: Broadcasters and Indecent Political Advertising*, 46 FED. COMM. L.J. 267, 286–87 (1994) (arguing that broadcasters can channel abortion advertisements to safe harbor but warns against expanding definition of indecency; favors warnings and disclaimers); Hille von Rosenvinge Sheppard, *The Federal Communications Act and the Broadcast of Aborted Fetus Advertisements*, 1993 U. CHI. LEGAL F. 393, 410–14 (1993) (addressing advertisements containing images of aborted fetus suggesting amending § 315 to permit broadcasters to refuse to air; expand definition of indecency to include other offensive material such as violence; allow stations to channel and to ban political advertisements from children's television); Kristine A. Oswald, *Mass Media and the Transformation of American Politics*, 77 MARQ. L. REV. 385, 410 (1994); Lisa Suzanne Mangan, Comment, *Aborting the Indecency Standard in Political Programming*, 1 COMMLAW CONSPECTUS 73, 83–86 (1993) (considering abortion advertisements indecent, considering images of aborted fetuses as harmful programming; favoring permitting channeling which author does not consider censorship, and advocating applying the nuisance rationale of *Pacifica*); Helene T. Schrier, Comment, *A Solution to Indecency on the Airwaves*, 41 FED. COMM. L.J. 69, 104 (1988).

³¹⁸ See Mortlock, *supra* note 19, at 211–12, 221–25.

³¹⁹ See von Rosenvinge Sheppard, *supra* note 317, at 410–12.

could prohibit indecent material in political advertisements. Second, Congress could take a more revolutionary approach and completely repeal the indecency rules altogether. In the absence of congressional action, courts could do one of two things. Courts could hold that the indecency prohibition no longer serves the public interest. In the alternative, courts could uphold the new fleeting expletives policy on the grounds that the broadcast airwaves are a safe place for children, thus justifying the ban of even fleeting expletives outside the safe harbor. The Second Circuit's and the Supreme Court's decision in the fleeting expletives case has significant bearing on the resolution of this statutory conflict. Third, Congress could expand all of the rules in this tripartite to include all cable and satellite channels

This Article reiterates some of the older suggested resolutions and recommends others. This Article recommends the following, in order of preference: (1) amend § 1464 to expressly except political advertisements; (2) grant immunity to broadcasters; (3) repeal the indecency rules altogether or make them applicable to all services; (4) change the definition of indecent material; (5) amend § 312 and § 315 to prohibit indecent material in political broadcast advertisements; (6) permit channeling of indecent advertisements; (7) require or permit channeling of all political advertisements to the safe harbor; (8) wait for the perfect case and decide then; or (9) repeal § 312, § 315, and the Zapple Doctrine.

What follows is a discussion, in order of preference, of some plausible resolutions of this matter.

A. *Amend § 1464 To Expressly Except Political Advertisements*

Congress could amend the indecency statute to expressly except political advertisements from the scope of the indecency statute. The D.C. Circuit in *Becker v. FCC*³²⁰ seems to have demonstrated a willingness to do just this. This would be an easy solution relieving broadcasters of potential liability. Such a resolution would continue to enforce the indecency prohibition against broadcasters in all other contexts, but would close the current loophole and provide clarity to broadcasters in situations in which they are presented with requests to air political advertisements containing indecent material. Although § 1464

³²⁰ 95 F.3d 75 (D.C. Cir. 1996).

contains no express exceptions, the Commission also demonstrated a willingness to carve out exceptions to the indecency rule in the *Omnibus Remand Order* when it declined to sanction the use of the word “bullshitter” on the CBS “Early Show” because it was a news interview.³²¹

This alternative will not serve the larger issue of protecting children from harmful material that might be presented in a political advertisement, but it will preserve the right of a political candidate to present him or herself to the electorate in the way he or she chooses. It also preserves the right of the electorate to see the candidate as he or she really is and to make an informed decision as to whether to cast a vote for that candidate.

Such a resolution of the dilemma, however, could be viewed as an endorsement of certain indecent speech and could undercut the government’s concern about subjecting viewers to the first blow inflicted by exposure to indecent material. Critics might argue that the first blow is no less painful in this situation than it would be in other forms of broadcast material.

Alternatively, the FCC could announce a policy expressly stating that it will not sanction indecent material in political advertisements. This solution likely would be of little comfort to broadcasters. Recent history reflects the FCC’s willingness to adhere to one policy, yet change that longstanding policy based on changed governmental interests.³²² Broadcasters would have no idea exactly when these government interests have changed, thus triggering application of a new policy.

B. Grant Immunity to Broadcasters

Congress could grant broadcasters immunity from suit if they choose to air these advertisements. This is a good short- and long-term solution. As others have suggested, this would be the better solution of all of the options as far as solving the statutory conflict. Currently, there is no statute or case law providing immunity from liability in the event of indecent political speech, but such immunity has been recognized and upheld in the context of defamatory political speech.³²³ The effect

³²¹ See *Omnibus Remand Order*, *supra* note 89, at 13,326–28.

³²² See *generally* *Omnibus Order*, *supra* note 19; *Omnibus Remand Order*, *supra* note 89.

³²³ See *Farmers Educ. & Coop. Union v. WDAY, Inc.*, 360 U.S. 525, 529–35. (1959).

of this option would be to grant broadcasters immunity from liability under the indecency provisions in § 1464 by granting the same type of immunity currently granted broadcasters who broadcast defamatory political advertisements.³²⁴

This proposal, however, does nothing to solve the complimentary problem of the public airwaves being used as a vehicle for the distribution of indecent material. The argument against a grant of immunity for broadcasters is that a vote for immunity likely would be interpreted by vocal opponents of broadcast indecency as a vote in favor of more broadcast indecency. Additionally, while this proposal also solves the problem of disparate treatment of services—broadcasting, cable, and satellite—opponents of broadcast indecency could frame this as a repeal of an indecency regulation and therefore a step in the wrong moral direction. They might prefer to see a prohibition of indecency not only on broadcasts, but also on subscription services as well. In other words, opponents of a grant of immunity in the context of indecent political advertisements probably would prefer, instead, broad prohibitions against indecency on all services and an express prohibition of indecency in political advertisements as well.

This immunity could extend to indecent and profane material as well as to racial hate speech and obscene speech in the spirit of providing the voting electorate as much information as possible and of revealing the true character of a candidate. Any such immunity clearly must be limited to the speech of qualified candidates for public office and should not grant any additional protection to broadcasters who use the public airwaves themselves to slander individuals or groups such as racial minorities.³²⁵ Nor should any such grant of immunity open the door for broadcasters to air any more indecent, profane, or obscene material in other contexts than is already permitted under § 1464 and the FCC's current regulations. Whether First Amendment principles will immunize third-party non-candidate political speech is an unanswered question.

³²⁴ See *id.* at 535.

³²⁵ See LaVonda N. Reed-Huff, *Radio Regulation: The Effect of a Pro-Localism Agenda on Black Radio*, 12 WASH. & LEE J. C.R. & SOC. JUST. 97, 140–43 (2006).

Scholars have suggested that perhaps it is nonsensical for Congress to grant broadcasters immunity from one of Congress's own most controversial prohibitions.³²⁶ Congress, however, creates exceptions to its statutes all the time. Case in point is one of the very statutes creating this statutory dilemma. Section 315 includes significant exceptions to the equal opportunities requirement.³²⁷

C. Repeal the Indecency Rules Altogether or Make Applicable to All Services

The Second and Third Circuits seem poised to overturn the Commission's policy of sanctioning fleeting expletives and images on First Amendment grounds.³²⁸ If so, the Supreme Court likely will uphold that decision. The courts could be wrong on this issue. Broadcasting does occupy a particular space in our American democracy and the marketplace of ideas. It also has certain public interest obligations not imposed on subscription services and the Internet. Part of this public interest obligation includes the protection and education of children.

Broadcasters are more like a department store than a boutique, in that they serve a wide and diverse demographic. Consequently, there must be trade-offs and a balancing of interests of those diverse populations. The safe harbor strikes a satisfactory balance by protecting children in the audience during those times of day that they are most likely to be viewers or listeners and providing time for presentation of content more suitable for more mature audiences. Just as technology makes it possible for parents to block unsuitable material, the available technology also makes it possible for adults to record indecent programming and to watch it any time of the day.

The fact that material is fleeting or repetitive does not change the fact that children are heavily influenced by the messages around them, whether they consume broadcast material with or outside the presence of their parents. Further,

³²⁶ See Mortlock, *supra* note 19, at 223–24 (asserting that because the conflict is between three federal statutes, it cannot be resolved by invoking the Supremacy Clause argument used in *WDAY* to find immunity for broadcasters of defamatory political speech).

³²⁷ 47 U.S.C. § 315(a) (2006); see also *supra* notes 59–63 and accompanying text.

³²⁸ See Larry Neumeister, *Appeals Judges Mock 'Fleeting Expletives' Policy*, AP FINANCIAL WIRE, Jan. 13, 2010.

as a whole, American society has become increasingly tolerant of foul language.³²⁹ That fact does not relieve the FCC of the obligation to regulate in the public interest, which might not necessarily conform to the public desire for indecency.

From a purely legal perspective, this seems to be a reasonable option to resolving many of the problems at hand—the unclear definition of indecency, the difficult application of the standards, and the disparate treatment of competing services. From a moral standpoint, however, this seems to be the wrong approach. To allow opportunities for more sexually oriented material over the broadcast airwaves would seem to be a step in the wrong direction.

The hurdles to be crossed to effectuate this proposal are quite high. On the one hand, the continued wisdom of the indecency prohibition has been called into question as evidenced in no small part by the Supreme Court's upholding of the FCC's authority to sanction fleeting indecent material—finding the FCC's conduct neither arbitrary nor capricious—yet remanding to the Second Circuit for consideration of First Amendment concerns.³³⁰

Moreover, as discussed, herein, the differing FCC regulation of cable and satellite service on the one hand and traditional broadcast service on the other hand, does not make much sense.³³¹ A majority of Americans receive television service via a subscription service provided either by a cable company or a satellite service provider.³³² Most consumers of television

³²⁹ See Wyatt, *supra* note 308 (reporting on the increased use of term “douche” on television).

³³⁰ FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1812–13, 1819 (2009).

³³¹ See Clay Calvert, *The Two-Step Evidentiary and Causation Quandary for Medium-Specific Laws Targeting Sexual and Violent Content: First Proving Harm and Injury To Silence Speech, Then Proving Redress and Rehabilitation Through Censorship*, 60 FED. COMM. L.J. 157, 170–76 (2008). Calvert criticizes the “underinclusiveness” of the FCC’s medium-specific regulation of minors’ access to indecent, profane, and violent material where broadcasters and providers of subscription services are regulated differently. *Id.* Calvert explores the legislative dilemma presented by the Second Circuit’s decision in Fox relating to fleeting expletives. *Id.* at 158. He suggests that “two knotty questions” now face legislators: (1) proving harm, and (2) proving redress by providing sufficient evidence that the regulatory scheme actually remedies the problem of exposure of children to harmful material. *Id.* at 164.

³³² In October 2008, eighty-five percent of Americans received television service via cable or satellite. *Fewer U.S. Terrestrial TV Viewers After Analog Switch-Off*,

programming make very little practical distinction between the services when channel surfing or selecting programs. Consequently, on the surface, it makes very little sense that the broadcaster occupying channel nine on the channel lineup is subject to one set of rules when the cable channel on channel nineteen might abide by a different set of rules. In the context of political broadcast advertisements, perhaps it is nonsensical to impose upon political candidates one set of rules when broadcasting on cable or satellite but another set when broadcasting on traditional broadcast stations. Perhaps the broadcast indecency rules have seen better days.

This alternative gets right at the issues before the U.S. courts of appeals and the U.S. Supreme Court relating to the Commission's departure from thirty years of policy of not acting on fleeting expletives and images. The FCC has had a difficult time articulating a reasoned explanation for changing the longstanding policy. Nevertheless, as it currently stands, the FCC really may sanction fleeting images and expletives.³³³

Broadcasters argue that the current indecency rules put them at an economic disadvantage compared to cable and satellite services, particularly in this era of communications convergence and widespread availability of more advanced communications services.³³⁴ Under the current rules, television and radio broadcasters are prohibited from airing the type of racy programming that has been popular of recent on the subscription channels.³³⁵ Cable and satellite television and radio channels do

ABI RESEARCH, Oct. 21, 2008, *available at* <http://www.abiresearch.com/press/1269-Fewer+US+Terrestrial+TV+Viewers+After+Analog+Switch-off:+Survey>.

³³³ *Fox Television Stations*, 129 S. Ct. at 1812–13.

³³⁴ See Lili Levi, *Chairman Kevin Martin on Indecency: Enhancing Agency Power*, 60 FED. COMM. L.J.F. 19, 32 (2008), *available at* http://www.law.indiana.edu/fclj/pubs/v60/no1/Levi_Forum_Final.pdf.

In a world in which distinctions between cable and broadcast are in many ways chimerical and in which cable has experimented with edgier programming, continuing stringent enforcement of indecency rules against broadcast stations would simply disadvantage broadcasters vis-à-vis their regulatorily exempt competitors without significantly reducing the availability of sexual content on television. This Response does not claim that à la carte will necessarily lead to the consequences detailed above. It simply argues that the Chairman's failure to address the possibility that à la carte distribution could lead to either overbroad or underinclusive speech regulation is a significant omission.

Id.

³³⁵ See Calvert, *supra* note 307, at 172–73.

not operate subject to FCC licenses and are not subject to these indecency prohibitions. Consequently, they may air more harsh language and more crude sexual content any time of the day, not just during the safe harbor.³³⁶

The FCC could expand each of the rules to include all cable and satellite channels. This proposal would require all cable, satellite, and broadcast stations to provide reasonable access and equal opportunities to political candidates and would prohibit indecent material on all services equally. The benefit, of course, is that it could potentially benefit the political process by securing access to more outlets for political candidates. This benefits the electorate and arguably society as a whole. Such a resolution might be favored by proponents of rules that remove indecency from all of television. Groups like the Parents Television Council are concerned about the prevalence of profanity and sexual content on all services, not just broadcast television.³³⁷

The problem, however, is that the terrible confusion surrounding broadcast indecency would then be introduced to the subscription services arena as well.³³⁸ While one problem would be solved, a larger one would be created. Disallowing all indecency even on cable and satellite potentially raises more significant constitutional issues, including First Amendment challenges, than even those raised by application of the rules to broadcasters.³³⁹ While this proposal would put all services on equal footing, the unfortunate result, of course, would be to

³³⁶ *Id.*

³³⁷ See, e.g., Brief for Amicus Curiae Parents Television Council in Support of Petitioners at 1, *Fox Television Stations*, 129 S. Ct. 1800 (No. 07-582); see also Ted Hearn, *Stevens Adds Cable to Indecency Jihad*, MULTICHANNEL NEWS, Mar. 7, 2005, at 1 ("[A] recent Parents Television Council study . . . said that 75% of teenagers watch MTV, which includes programming rife with 'sexually suggestive acts of violence and abuse of women.'"). Former FCC Chairman Kevin Martin and former Senator Ted Stevens had called for regulating indecency on cable and satellite services. See *Open Forum on Decency: Hearing Before the Subcomm. on Commerce, Science and Transportation*, 109th Cong. 1-2, 9-12 (2005) (statements of Sen. Ted Stevens, Chairman, S. Comm. on Commerce, Science and Transportation and of Kevin J. Martin, Chairman, FCC), available at <http://www.commerce.senate.gov/pdf/decenty2.pdf>.

³³⁸ See Calvert, *supra* note 331, at 166.

³³⁹ See Clay Calvert, *Bono, the Culture Wars, and a Profane Decision: The FCC's Reversal of Course on Indecency Determinations and Its New Path on Profanity*, 28 SEATTLE U. L. REV. 61, 75 (2004).

extend the dilemma to more services than it already is, thus exacerbating the statutory dilemma at issue in this Article.

Any such economic disadvantage type argument made by broadcasters, however, must be informed by the fact that broadcasters operate in a highly regulated industry and pursuant to a license, which does not confer on them an absolute fee simple ownership right.³⁴⁰ Because of this limitation, broadcasters are not entitled to any expectation of treatment on parity with that of subscription services. While it is true that subscription services do use the public airwaves, and that satellite service providers are subject to licensing of their satellites and earth stations, they simply are not regulated in the same way as are broadcast licensees. This quasi-private property nature of subscription services is in part why the FCC has not to date extended the broadcast rules to satellite and cable services.³⁴¹

With ratings for cable television programs rising, arguably, American viewers and listeners are not as offended by the state of broadcast programming as the increased number of indecency complaints would suggest.³⁴² Therefore, perhaps the indecency rules no longer are necessary or desirable by the contemporary viewing community.

On the other hand, while most indecency complaints in recent years are the result of a very active watchdog group, many Americans if pressed on the issue might reveal a strong distaste for the crass material on broadcast as well as cable and satellite channels.³⁴³ While not compelled to complain to the FCC about

³⁴⁰ See Radio Act of 1927, ch. 169, 44 Stat. 1162 (stating that the Act does not provide for private ownership of airwaves; rather, permission to use airwaves is conferred by the government in the form of a license). A license is a nonpossessory right to use or go over the property of another for a specific purpose. See, e.g., *Seaboard Air Line Ry. Co. v. Dorsey*, 149 So. 759, 761 (Fla. 1933) (“A license is a mere permit to use the property of another.”); *Tatum v. Dance*, 605 So. 2d 110, 112 (Fla. Dist. Ct. App. 1992) (quoting *Dotson v. Wolfe*, 391 So. 2d 757, 759 (Fla. 1980), *aff’d on reh’g*, 629 So. 2d 127 (Fla. 1993) (“[A] license is merely a personal right to use the property of another for a specific purpose.”).

³⁴¹ The FCC has long resisted calls to extend its indecency regulations to subscription services. See John C. Quale & Malcolm J. Tuesley, *Space, the Final Frontier—Expanding FCC Regulation of Indecent Content onto Direct Broadcast Satellite*, 60 FED. COMM. L.J. 37, 38 (2007).

³⁴² See NIELSEN, A2/M2 THREE SCREEN REPORT (2009), http://en-us.nielsen.com/etc/medialib/nielsen_dotcom/en_us/documents/pdf/white_papers_and_reports.Pa.r.30466.File.dat/3ScreenQ309_USrpt_12.07final.pdf.

³⁴³ The Parents Television Council is a media watchdog group that seeks to address the prevalence of “sex, violence, and profanity on television” and radio via

this content, they might indeed desire greater federal control and regulation of the indecent television and radio programming on all services, particularly due to the lack of distinction in their consumption of the services. In sum, they might favor increased regulation of cable and satellite services as well. The public's response to such a proposal turns at least in part on whether the Parents Television Council and groups like it are speaking on behalf of a silent majority or a vocal minority. Perhaps the general viewing and listening public simply have become particularly desensitized to broadcast content, are not offended, or they are offended, but just not to the point of filing a formal complaint. It is difficult to tell exactly which is the case.

Regarding fleeting expletives, a compelling argument could be made that children are harmed just as much by the cumulative effects of repeated exposure to isolated and fleeting expletives over time as they are by exposure to material in a single broadcast that dwells on or repeats sexual or excretory material or activity. The bottom line is that once a child is exposed to this content, it is forever emblazoned in the child's psyche. This essentially is the FCC's argument supporting its policy change. It should be of no or little consequence that the FCC is slow in coming to this conclusion—thirty years to be exact. Federal agencies must be allowed to revise its policies after careful consideration of the past and anticipated future effectiveness of those policies. Perhaps the FCC just needs to articulate this more clearly to justify not only its policy change, but to justify retention of the indecency and profanity restrictions altogether. This proposal solves the statutory conflict, but it also arguably is the most controversial of the proposed resolutions. It also seems the most likely taking into consideration recent language from members of the Supreme Court.³⁴⁴

D. Change the Definition of Indecent Material

The definition of indecent material could be changed to include not just patently offensive material that describes sexual or excretory activities or organs, but also to include any other

enforcement of existing rules and influencing ongoing communications policy. See Parents Television Council, *About the Parents Television Council*, <http://www.parentstv.org/PTC/aboutus/main.asp> (last visited Apr. 20, 2010).

³⁴⁴ See *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1820–22 (2009) (Thomas, J., concurring); *id.* at 1833–38 (Breyer, JJ., dissenting).

material that could be harmful to children. The FCC could refine the definition of indecency to include sexually suggestive, as well as racially offensive speech, such as that of J.B. Stoner.³⁴⁵ Under current application of indecency principles, the word “shit” is indecent, whereas “nigger” is not. Both are equally offensive. Also, it could include depictions of gruesome images, such as aborted fetuses, as well as all fleeting images and utterances of indecent or offensive speech.

Such a vague and broad definition, however, is sure to be found to run afoul of the First Amendment.³⁴⁶ Despite the likely constitutional hurdle, this solution could resolve the statutory conflict while simultaneously protecting children from various forms of harmful speech. Hate speech also enjoys significant First Amendment protection despite the psychological harm caused by the speech to the individuals and groups it targets and despite the overall harm to society caused by the speech.³⁴⁷ Generally, racist speech is protected, except in the workplace where it creates a hostile work environment or it constitutes fighting words creating a true threat of violence.³⁴⁸

The anti-censorship provisions in § 326 and § 315 are further evidence of the freedoms afforded political candidates wishing to use the public broadcast airwaves in furtherance of their campaigns.³⁴⁹ In the political broadcast context, the FCC acquiesced to this general rule in the case of J.B. Stoner by upholding the right of access afforded candidates for federal elective office by § 312 and rejecting efforts to characterize racist speech as indecent or obscene.³⁵⁰

³⁴⁵ See Stoner II, *supra* note 19, at 943–44; Stoner I, *supra* note 19, at 636.

³⁴⁶ U.S. CONST. amend. I.

³⁴⁷ See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992).

³⁴⁸ See, e.g., *Virginia v. Black*, 538 U.S. 343, 358–59 (2003); *R.A.V.*, 505 U.S. at 391 (striking a city ordinance banning bias-motivated crimes such as cross burnings because the statute prohibited otherwise permitted speech, and stating that the First Amendment does not permit the government to impose special prohibitions on speakers who express views on disfavored subjects); *Skyline Broad., Inc.*, 22 F.C.C.R. 8395, 8397 (2007) (“[I]f there is to be free speech, it must be free for speech that we abhor and hate as well as for speech that we find tolerable and congenial.” (quoting *Zapis Commc’ns Corp.*, 7 F.C.C.R. 3888, 3889 (1992))).

³⁴⁹ See 47 U.S.C. §§ 315, 326 (2006).

³⁵⁰ See Stoner II, *supra* note 19, at 944–45; see also Clay Calvert, *Imus, Indecency, Violence & Vulgarity: Why the FCC Must Not Expand Its Authority over Content*, 30 HASTINGS COMM. & ENT. L.J. 1, 10–11 (2007) (suggesting that any attempts to expand the definition of broadcast indecency to include racist and sexist speech will be void for vagueness).

This resolution would require the Commission to offer a reasoned explanation for changing its longstanding policy of permitting the broadcast of fleeting material and also various forms of hate speech that enjoy constitutional protection.³⁵¹ The FCC probably could not clear this constitutional hurdle.

E. Amend the Reasonable Access and Equal Opportunity Statutes To Prohibit Indecent Material in Political Broadcast Advertisements

Congress could clarify or amend the reasonable access and equal opportunity statutes to expressly exclude indecent political advertisements. To do so would resolve the conflict between the three conflicting statutes and effectively ban all indecent broadcast material from the airwaves between the hours of 6:00 a.m. to 10:00 p.m. During the day, candidates would be free to put their indecent advertisements on cable and satellite channels and on the Internet, bypassing broadcasters altogether. Voters likewise could receive the candidate's message simply by switching to the Internet or to a cable or satellite channel. The public still, however, might be subjected to indecent material that might be harmful to children during the late night hours, but broadcast would be a relative safe haven.

In the context of indecency, obscenity, and profanity in the broadcast media, the FCC achieves the goal of serving the public interest through a combination of governmental and citizen action. The FCC does not monitor the programming of its licensees for the purpose of levying forfeitures for rule violations, but rather regulates in large part by acting upon complaints about media content, which are filed with the agency by broadcast viewers and listeners after the material has been broadcast.³⁵² At the root of indecency, obscenity, and profanity determinations are the contemporary community standard and

³⁵¹ See *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009) (addressing the isolated and fleeting use of various forms of the words "shit" and "fuck" and other profane material); *CBS Corp. v. FCC*, 535 F.3d 167, 175 (3d Cir. 2008), *vacated*, 129 S. Ct. 2176 (2009).

³⁵² See, e.g., Becker, 7 F.C.C.R. 7282, 7282 (1992) ("The Commission and Bureau have declined to render indecency rulings in advance of broadcasts." (citing Letter from Mass Media Bureau, FCC, to Christian Action Network (June 12, 1992) (on file with author))).

the context in which the material is presented.³⁵³ Deputizing the entire public as the watchdogs or monitors of broadcast material, in theory, results in agency decisions more closely reflecting these community standards than would be possible were those determinations made solely by a small number of commissioners or FCC staffers. Moreover, this public watchdog function is essential because, as discussed herein, the FCC is prohibited from engaging in censorship of all broadcast material, not just material of a political nature.³⁵⁴

Taking into consideration contemporary community standards and the context in which the speech occurs, an argument could be made that political advertisements should be a safe haven from presentation of gratuitous, confusing, and often untrue private, intimate, and sexually suggestive matters. The political broadcast advertisement, it could be argued, simply is an inappropriate venue for the racy content commonplace in other genres of television and radio broadcast programming. With the amount of information Americans process daily from multiple media sources, it has become more difficult to sift through it all and to find the real truth, particularly when convoluted by irrelevant, misleading, and gratuitous sexual or sexually suggestive content. Political broadcast material should be free from this type of often misleading content. The political process ideally would seek to highlight truths and to inform the electorate, not to pander, titillate, or seduce with misleading and gratuitous sexually suggestive content.

As currently written, the statutes and regulations enacted to serve the public interest in protecting children from the potential harms of exposure to indecent, obscene, and profane material broadcast via the public airwaves are in conflict with the laws that have been enacted to enhance and protect the political process by protecting the rights of candidates for political office to use the public airwaves for the purpose of furthering their political campaigns.³⁵⁵

³⁵³ See Indecency Policy Statement, *supra* note 90, at 8002; FCC v. Pacifica Found., 438 U.S. 726, 750 (1978) (“We have not decided that an occasional expletive . . . would justify any sanction or, indeed, that this broadcast would justify a criminal prosecution. The Commission’s decision rested entirely on a nuisance rationale under which context is all-important.”).

³⁵⁴ See 47 U.S.C. §§ 315, 326.

³⁵⁵ See 18 U.S.C. § 1464 (2006) (prohibition against the broadcast of indecent, profane, or obscene material); 47 U.S.C. § 312 (2006) (reasonable access for federal

The wisdom of this solution is highly questionable, as currently it is not even clear that Congress and the FCC should ban any indecent material on broadcast stations at all. In light of the uncertain constitutional viability of the current indecency rules, any resolution that depends on a broadcaster's actual assessment of the content of an advertisement for indecency is bound to be problematic, creating more problems than would be solved. The definition of indecency has proven difficult to apply, particularly as it relates to fleeting images and utterances. The standards from one station to another and from one community to another could be applied differently, making it nearly impossible for candidates to predict which advertisements will be accepted, and at which time of the broadcast day their advertisements might be aired. This is an inefficient resolution that also could drive up costs to political candidates and broadcasters who engage in litigation over the issue of whether an advertisement was properly accepted, rejected, or channeled.

The difficulty in determining what material qualifies as indecent can create greater confusion. This alternative leaves too much discretion in the hands of broadcasters and presents greater opportunity for misuse or misapplication of the rules and the indecency standard. Until the definition of indecency and its scope and application are clarified, this solution is unacceptable and unworkable.

F. Permit or Require Channeling of Indecent Political Advertisements to the Safe Harbor

Congress could expressly create an exception to the anti-censorship provisions of § 326 and § 315 of the Communications Act to permit broadcasters to channel indecent political advertisements to the safe harbor hours of 10:00 p.m. to 6:00 a.m. when children are less likely to be in the viewing audience. Without this exception, such attempts to channel political advertisements to particular hours of the broadcast day would

candidates); 47 U.S.C. § 315 (2006) (equal opportunities for all candidates and censorship prohibition); 47 C.F.R. § 73.670 (2010) (limiting the number of minutes that may be devoted to commercials during children's television programming); 47 C.F.R. § 73.4165 (2010) (indecent broadcasts); 47 C.F.R. § 73.4170 (2010) (obscene broadcasts).

violate the express prohibitions against censorship and contradict the D.C. Circuit's holding in *Becker*.³⁵⁶

To effectuate this resolution, Congress, the courts, and the FCC would need to adequately address the D.C. Circuit's holding in *Becker* that channeling to the safe harbor political advertisements containing abortion-related images violated § 312(a)(7) and § 315.³⁵⁷ Political candidates were held to have the right of access to times of the day when voters are most likely to be in the audience.

If broadcasters are given the authority to so channel indecent political advertisements, the potential harm to children would be diminished, albeit only to the extent that the underlying assumption that children are less likely to be in the viewing audience actually holds true. Permitting channeling of select advertisements, however, has some other more identifiable problems.

The most obvious problem is associated with the difficulty in actually defining what constitutes indecent material. Again, there is too much discretion left to the broadcasters to apply a confusing and unclear set of rules. Because neither the courts, Congress, nor the FCC has been able to provide broadcasters clear guidance as to what material it will sanction, broadcasters might err on the side of caution and channel more material than is necessary.³⁵⁸ While the definition of what constitutes indecency becomes marginally clearer with each court decision, few broadcasters necessarily want to put their licenses in jeopardy and incur the huge costs of litigation to defend a decision to air a political broadcast advertisement for a case to work its way through the judicial system. Conversely, broadcasters could find themselves liable for having channeled an advertisement that the courts ultimately find was not indecent and should not have been relegated to the safe harbor. Either way, the broadcaster loses.

The media should simply be the forum for discussion and distribution of ideas, not the censor of the message. In light of

³⁵⁶ See *Becker v. FCC*, 95 F.3d 75, 84–85 (D.C. Cir. 1996).

³⁵⁷ *Id.*

³⁵⁸ See B. Chad Bungard, *Indecent Exposure: An Economic Approach To Removing the Boob from the Tube*, 13 UCLA ENT. L. REV. 187, 201–02 (2006) (highlighting the FCC's inconsistent and ineffective application of the indecency definition and advocating for the creation of an Indecency Review Board to rectify the situation).

the FCC's current activity in the indecency arena, and the lack of clarity as to what actually constitutes indecent material, broadcasters should not be pushed into a corner. To do so would potentially quell speech as broadcasters, fearful of indecency forfeitures, would become overly cautious and might reject too many requests for political air time.

A related problem is that of discriminatory treatment of indecent advertisements and those that are not. A large segment of the viewing audience might be deprived of the opportunity to view advertisements that might be aired only in the wee hours of the morning. Not only is the candidate harmed in that he or she is not given access to the same audience as might be his or her competitors, but so is the entire electorate. This solution would undoubtedly trigger litigation claiming discriminatory treatment of political speech and harm to the electorate.

The government may impose reasonable time, place, and manner restrictions on speech so long as the restrictions are narrowly tailored to achieve a significant government interest and do not burden more speech than is necessary.³⁵⁹ Channeling is more like permissible time, place, and manner restrictions and should be permitted. This separation of indecent material suitable for adults, but not children, generally is accomplished in broadcasting by channeling indecent programming to the safe harbor. The Commission has held that requiring indecent broadcast material to be channeled in this way is a reasonable and narrow time, place, and manner restriction consistent with the First Amendment protections afforded other media.³⁶⁰ This alternative is complicated by the Supreme Court's decision in *Fox Television Stations* and of the highly probable outcome in the Second Circuit's handling of the case on remand.³⁶¹

One may argue, however, that granting broadcasters the authority to channel certain advertisements to the safe harbor while permitting others to be broadcast during the hours of 6:00 a.m. to 10:00 p.m. is discriminatory because the time of day the advertisements would be broadcast would be channeled based solely on the content of the message.

³⁵⁹ See *City of Renton v. Playtime Theatres*, 475 U.S. 41, 46-47 (1986); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 63 n.18 (1976).

³⁶⁰ See *Pacifica M&O*, *supra* note 101, at 2699.

³⁶¹ See *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1819 (2009).

Neither Congress nor the FCC should push any policies permitting broadcasters to refuse to air these advertisements. Fostering a free marketplace of ideas and a political arena free from censorship requires that neither broadcasters nor the government quell political speech. While it is quite another story were the broadcaster itself to make hateful, obscene, indecent, or profane comments in other contexts, it could be said convincingly that allowing political candidates to reveal their true selves through their political advertisements, no matter how distasteful, is actually in the public's best interest.

A collateral benefit of airing even negative material is that the advertisements say as much about the sponsor of the advertisement as they do about the person being attacked. It takes a truly unique political candidate to use the word "nigger" or any other racially offensive term on television or the radio, or to use the public airwaves during prime time to air indecent, obscene, or profane material wholly inappropriate for children. Perhaps the public is better off having had this information available in the public sphere. The electorate in many ways is made better off by insight into the character of a sponsor of such an advertisement because it goes directly to the public's determination as to whether a candidate who sponsors such a negative advertisement is ripe to be entrusted with the public trust that is commensurate with holding public office. The public is better served by having access to this information prior to the election than by finding out after a candidate wins the office that he or she intends to carry out his or her governmental authority in a manner offensive, oppressive, or discriminatory to the general public he or she has been elected to serve.

Allowing the advertisements to show the true fiber and character of a candidate is better for society in the long run to the extent that the electorate can see past the hype and hysteria to the true message and messenger. Politically correct speech may conceal the true character of a candidate, which is not always in society's overall best interest. On the other hand, this type of speech by a candidate may stoke negative stereotypes or may be unnecessarily divisive. Nevertheless, it is better that the public know this about a candidate prior to the election.

G. Require or Permit Channeling of All Political Advertisements to the Safe Harbor

Congress could require or permit all broadcast advertisements to be channeled to the safe harbor, thereby removing the discretion of broadcasters in deciding which advertisements are indecent and which ones are not. In addition to the problem presented by the D.C. Circuit's holding in *Becker*, such a requirement might be found to be an unconstitutionally overbroad attempt to regulate a very small subset of otherwise permissible speech.³⁶² Additionally, to do so would potentially harm the entire political process, as the political advertisement would take on the same status as late night infomercials. They would be rendered ineffective, as the potential audience reach would be significantly reduced. Any such regulation that allowed for broadcaster discretion to channel or not to channel would suffer from the same problems as that of permitting broadcasters to refuse to air indecent advertisements, as broadcasters still would have to make the initial determination of indecency, which in and of itself is wrought with problems. While permitting or requiring channeling of all political advertisements would deal with this problem of broadcaster discretion, it would detrimentally impact voter education, issue awareness, and the marketplace of ideas.

This proposal does not necessarily help the overall political process. Overall, this is a more equitable resolution than those options depending on licensees' determinations of indecency. Nevertheless, this resolution severely undermines concerns about protecting political candidates' access to a broad audience and about not shutting candidates out from certain hours of the day when that audience might be largest.

H. Wait and See

Courts and Congress could simply wait and see what the FCC does when a licensee actually does broadcast an indecent political advertisement. Because some feel the possibility of an indecent political advertisement is remote, regulators might prefer this alternative. They would be waiting particularly to see whether the Commission receives any complaints about the broadcast and whether it issues a notice of apparent liability and

³⁶² *Becker*, 95 F.3d at 84-85.

forfeiture against the broadcaster for the indecent broadcast. The FCC could set forth a policy of not acting on such complaints in the context of political advertisements or could issue a forfeiture, which it would have to substantiate, particularly if the material is fleeting in nature. Pursuing this course, however, fails to provide broadcasters with sufficient notice of what broadcast material the Commission will or will not sanction. It also fails to account for the agency's willingness to change policy without a rulemaking proceeding.

Doing nothing at all does not seem particularly troublesome if you take past FCC inaction as an indicator of the possibility of a legal issue arising. However, it is only a matter of time before this rationale collapses. The FCC simply has not yet been presented with a case involving a political advertisement containing material that falls neatly within its definition of indecency. If presented with a clearer case, the FCC very well might sanction a broadcaster under pressure from groups like the Parents Television Council. Until the Commission has a real case before it, which route it will take remains a mystery.

I. Repeal the Reasonable Access, Equal Opportunities, and Anti-Censorship Provisions Altogether

Repeal of the reasonable access, equal opportunities, and anti-censorship provisions could eliminate the conflict. Nevertheless, this alternative is the most problematic of all. The problems with this proposal are obvious. Were these provisions to be repealed, a licensee would be free to reject political advertisements altogether. A broadcaster also could freely discriminate against candidates, parties, and issues. Broadcasters might charge candidates higher rates than other advertisers or otherwise offer them less than favorable terms and treatment. If the indecency prohibition stood, a licensee voluntarily permitting candidates to use its station for the purpose of political speech could then be subject to the indecency provisions of § 1464 if that speech were later found to be indecent under an uncertain indecency policy.

This least favored alternative would vest licensees with too much power over candidates' access to the electorate via the public airwaves. Additionally, because of the repeal of the Fairness Doctrine, candidates would not have any right to respond to attacks by opponents who might include deep-

pocketed corporations following the Court's ruling in *Citizens United*. Not only would candidates be harmed by such a policy, but so would the general public and the political process itself. The public interest would not be served.

CONCLUSION

Even if the advertisements in the new genre of racy political advertisements discussed in this Article do not meet the definition of indecency, they are dangerously close to the tipping point that the courts and the FCC have danced around for many years. They are closer to the realm of broadcast indecency than are the abortion advertisements of the 1990s or the racially offensive advertisements of the 1970s, yet not quite as egregious as the wardrobe malfunction of Super Bowl XXXVIII, nudity of "NYPD Blue," or the expletives of the various awards shows—no matter how fleeting—that have suffered the wrath of the FCC in recent years. Nevertheless, in the context of promoting a democratic society in which voters are adequately informed about candidates' stance on substantive issues, these advertisements lack any serious political merit and add little to nothing of value to the political process. The likelihood of indecent content appearing in a political campaign advertisement, while once unimaginable, or at least considered outside the bounds of public decency, clearly now has become quite possible, particularly with the doors now open for third-party corporations to request airtime on broadcast stations.

The appropriate solution to this dilemma, however, is not to revoke reasonable access and equal opportunities for political candidates, for to do so would frustrate the public interest obligations of broadcasters and would harm the public. Nor is the answer to prohibit indecent material from political advertisements because of the risk of censorship and the possibility of undue influence of the media on the political process. Absent a complete repeal of the indecency ban altogether, which could be on the horizon and legally justifiable, the more appropriate solution to this dilemma is to close the

current loophole left open by the three existing statutes and afford broadcasters the same type of immunity from liability that currently is afforded them in the context of defamation suits.³⁶³

³⁶³ See *Farmers Educ. & Coop. Union v. WDAY, Inc.*, 360 U.S. 525, 535 (1959).

